VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

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Volume III
(Pages 973 to 1464)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

(Testimony of Robert Victor Clark.)

Q. Did Silzle have any arrangement of any kind with Sunkist or Exchange Orange in the year 1950, to your knowledge, concerning the delivery of oranges to be processed or otherwise handled by Silzle without the payment therefor on or about the time of delivery?

A. Will you repeat the question?

Mr. Dixon: Will you please read it?

(Question read.)

The Witness: No.

Q. (By Mr. Dixon): Directing your attention to the year 1949, do you recall whether Silzle had any arrangement of any kind for processing any oranges or other products for Exchange Orange or Sunkist in that year?

A. I don't know the exact time. We did process grapefruit or blended juice for the Exchange Orange Products under a processing arrangement.

Mr. Dixon: Plaintiff would like to read into the record at this time the answer of the defendants Exchange Orange and Sunkist, or part of the answer to Interrogatory No. 14.

Mr. Williams: Will you show us the part you wish to read, please?

Mr. Dixon: I was about to do so, counsel. (Indicating.)

Mr. Williams: We have no objection, your Honor, except our objection that we have to counsel using the arrangement as the basis for a cause of action, the same as on other contracts.

(Testimony of Robert Victor Clark.)

The Court: What might be called your general objection?

Mr. Williams: Yes. It is the objection we have had to the Mission contract, as I understand it.

The Court: You mean——

Mr. Williams: Under the statute of limitations. It is a matter not pleaded and is barred by the statute.

The Court: Objection overruled. [844]

* * *

Mr. Dixon: The question, ladies and gentlemen of the jury, the interrogatory, is addressed to the defendants Exchange Orange and Sunkist and is as follows:

"Give the following information with respect to other orange transactions, including custom packing, with canners for the period contemplated herein"—which was for the years 1949 and 1950 and 1951—"the names and addresses of the canners, the dates of transactions, the terms, the tons of by-product oranges involved, the case volume and the dollar volume."

And the answer of Sunkist and Exchange Orange to that interrogatory sets forth many of the agreements that you have already had presented to you, and in addition thereto it contains the following:

"Season 1949-1950, E. A. Silzle Corporation, Anaheim, California, an unwritten processing arrangement [845] whereby E. A. Silzle Corporation processed oranges and grapefruit furnished by EOP into canned grapefruit-orange blend. EOP supplied the

(Testimony of Robert Victor Clark.)

oranges and grapefruit and paid the freight on the oranges and grapefruit to the E. A. Silzle Corporation plant and picked up the canned grapefruit-orange blend after processing.

"The E. A. Silzle Corporation furnished the cans and cases. Exchange Orange supplied the labels and sugar. The processor was allowed to keep the peel and to dispose of it without accounting to Exchange Orange. 266 tons of oranges were thus processed. 275 tons of grapefruit were thus processed.

"Cases produced from August 30, 1950, to September 16, 1950, amounted to 11,638, consisting of the following packs: 12/46 ounce cans per case; dollar volume of the processing was $15,469."

That is the end of the quotation from the answer to Interrogatory 14. [846]

Q. (By Mr. Dixon): Do you know, Mr. Clark, whether Silzle bought any of the blended juice thus processed in 1949 under the oral arrangement referred to in the answer to the interrogatory that I have just read? A. I don't recall.

Q. Do you know what happened, what was done with any of the single-strength orange juice that was processed by Silzle from oranges delivered to Silzle by Exchange Orange in 1951 under and in accordance with Plaintiff's Exhibit 25?

A. We received the oranges, processed it into single-strength juice, and then purchased the single-strength juice from the Exchange Orange Products under the provisions of that agreement.

(Testimony of Robert Victor Clark.)

Q. And the prices at which such purchases were made are set forth in the agreement, Plaintiff's Exhibit 25, are they, Mr. Clark?

A. The method of payment for the single-strength juice is set forth in the agreement.

Q. Can you state to the jury whether this agreement, Plaintiff's Exhibit 25, covered the purchase or acquisition of this juice by Silzle to the extent of the entire pack so processed by Silzle under this contract Plaintiff's Exhibit 25 with Exchange Orange?

A. Yes, it covered the entire pack made by Silzle on oranges received under this contract or this agreement. [847]

Q. I believe in excess of 163,000 cases were processed under this arrangement, were they not?

A. I believe, as I recall, the figure of 163,000 cases is the amount that we processed from oranges received from EOP.

* * *

Q. (By Mr. Dixon): Can you state to the jury whether all of the canned juice remaining in the Lawrence warehouse under Plaintiff's Exhibit 25, on February 1, 1952, was sold in accordance with the provisions of that February 1 date arrangement? A. Yes.

Q. Do you have with you the record of the sales made subsequent to that date, Mr. Clark?

A. No, I don't have the record of sales.

Q. I thought you showed me something this morning which had D sales, E sales, F sales, G sales,

(Testimony of Robert Victor Clark.)

H sales, and I sales. [848]

A. I thought you meant invoices. I am sorry.

I have a record here showing our accounting to the EOP for the purchase of single-strength juice purchased under this agreement.

Q. Will you state what you have there with reference to those sales made after February 1, 1952?

A. I have a record prepared by our office showing our production and our movement of the merchandise, which is the sale, and the amount of money paid for the juice based on sales price.

Q. I notice we have here E basis, F basis, G basis, H basis; is that the end of the numbers, or are there some more after H?

A. In February of '52 the basis of disposing of inventory was on an out-of-state basis or in-state basis. It was no longer given the letter as identification.

Q. Can you explain to the jury what is meant by this C basis, D basis, E basis, F basis, G and H basis?

A. It would be a basis of the sales price, and the sales price I do not recall at this time.

The Court: Where did you get those letters?

The Witness: It is just a method of identifying a different sales price for the product.

Q. (By Mr. Dixon): Do you know whether that letter was given to your office by Exchange Orange or Sunkist for the [849] purpose of recording these different sales?

A. I do not recall receiving written instructions.

(Testimony of Robert Victor Clark.)

Q. Do you recall ever having been advised by anyone to place those numbers—not numbers, but letters—after or before those sales?

A. I do not recall any instructions, specifically, for those letters.

The Court: Were those letters something that your company originated as part of your bookkeeping system, or did they have some relationship to some conversation, letter, or other arrangement with EOP?

The Witness: It could be as a result of conversation between myself and the accountant at EOP, or some other person up there, which I can't recall the name of at this time. [850]

Q. (By Mr. Dixon): Will you tell the jury, then, again just what those different letters mean insofar as the records of Silzle are concerned?

A. Well, it identifies the movement of the merchandise and having a different sales price. Each letter was of a different sales price.

Q. By sales price, you mean what?

A. Sales price of the merchandise sold, the f.o.b. price.

Q. Well, I guess I didn't make my question clear, Mr. Clark: Is that the selling price of the merchandise by Silzle to a buyer? A. Yes.

Q. And does that price have any relation to the price paid by Silzle to Exchange Orange for the Valencia juice covered by those sales?

A. Yes.

Q. And what is that relationship?

(Testimony of Robert Victor Clark.)

A. The merchandise was sold under the different bases as outlined and the amount paid to the EOP was that price less certain credits given to the corporation for processing, advertising, hauling, and other things, as outlined in the agreement.

Q. By that you mean those items that are contained in Plaintiff's Exhibit 25 as being the items under the headings [851] "Less"? A. Yes.

Q. And those items include the label allowance, manufacturing cost, advertising allowance, trucking allowance, sales expense, brokerage and profit items contained therein, do they? A. Yes.

The Court: You say has a relationship. That might mean anything. What was the relationship? Was the sales price at which you sold these goods f.o.b. the same price that you paid EOP less the discounts, or by the relationship do you mean it was always greater or always smaller? What was this relationship?

The Witness: This sales price of the merchandise on these different lettered bases was sold for that price and we accounted to the EOP for that price less these items mentioned in the exhibit.

Q. (By Mr. Dixon): Mr. Clark, I believe you stated that you were in charge of production, is that correct? A. Yes.

Q. For the Silzel Company. Was the amount of tonnage of oranges which were delivered to Silzle under Plaintiff's Exhibit 25 the total amount or substantially the total amount of all the Valencia oranges processed by Silzle during 1951 into single-strength Valencia orange juice? [852]

(Testimony of Robert Victor Clark.)

A. You mean the entire year 1951?

Q. No, into single-strength Valencia orange juice.

A. Well, we processed single-strength Valencia orange juice from the beginning of the year clear through the end of the Valencia season.

Q. Yes, I understand, but did you purchase and pay for any oranges that were thus processed into single-strength Valencia juice from anyone after Silzle started to process these oranges under Plaintiff's Exhibit 25?

A. The majority of the oranges received during that period were received under this agreement.

Q. You did, however, purchase and process some tons of Valencia oranges prior to the processing that was done under Plaintiff's Exhibit 25, that is a fact, isn't it?

A. The plaintiff's exhibit has two parts. One part showed a direct sale of tonnage of fruit. I believe it is a little over 500 tons that were purchased as an outright sale of fruit.

The Court: Well, here is what counsel is getting at. This is wasting time. Let's get down to brass tacks on this. Prior to the time that you had any dealings with the EOP, the Silzle Company had any dealings with EOP in 1951, did you or did you not buy Valencia oranges from independent sources other than the EOP for the purpose of making single-strength orange juice? [853]

The Witness: We purchased oranges from independent sources and from the Sunkist organizations

(Testimony of Robert Victor Clark.)

prior to the time we had the agreement with the Exchange Orange.

The Court: Now, after you entered into the agreement, Exhibit 25, with EOP, did you thereafter buy Valencia oranges for the purpose of making single-strength juice from anybody else other than what oranges you got from EOP?

The Witness: Not as a general rule. We might have purchased some small lots here and there from growers. I don't recall exactly. [854]

Q. Now, Mr. Clark, I believe Plaintiff's Exhibit 25 calls for the production of some 12-ounce stock; is that correct? A. Yes.

Q. Did the Silzle company have a 12-ounce production line? A. Not at that time.

Q. Will you state to the jury where the juice that was canned in that size can was processed?

A. We had the 12-ounce merchandise that is covered by this agreement processed at the Winckler & Smith plant.

Q. Can you recall, or do you know anything about any arrangement that was entered into between Silzle and the Winckler company, Winckler & Smith, for that processing?

A. As I recall, we furnished the fruit and in accounting practice we sold the fruit to the Winckler & Smith company, and then purchased the merchandise from them based on the price as established by the sales price of the fruit, to get it back on our books as a purchase of merchandise.

Q. Whatever was thus processed by Winckler &

(Testimony of Robert Victor Clark.)

Smith and turned back to E. A. Silzle Company was then paid for by Silzle to Exchange Orange under and pursuant to the provisions of Plaintiff's Exhibit 25?

Mr. Williams: I am sorry. I have to object, again, to the form of the question. [855]

The Court: Overruled.

The Witness: Will you restate the question, please?

Mr. Dixon: Will you read it, Mr. Reporter, please?

(Question read by the reporter.)

The Witness: Yes.

Q. (By Mr. Dixon): I am not sure that the record already contains an answer to this question, Mr. Clark, therefore I may be a little repetitious in asking it, but is it my understanding that substantially no Valencia oranges were purchased and paid for by the Silzle company from any other supplier during the 1951 season for processing or to be processed into single-strength Valencia orange juice, after Plaintiff's Exhibit 25 was entered into?

A. If any was purchased, it was a very small amount.

Mr. Dixon: I believe that is all.

(Testimony of Robert Victor Clark.)

Cross-Examination

By Mr. Williams:

Q. Mr. Clark, did you have anything to do with the selling of the products manufactured by Silzle?

A. No. That would be in the hands of our sales department.

Mr. Dixon: Pardon me, counsel. I don't want to interrupt, but may I ask one other question?

Mr. Williams: Certainly.

Mr. Dixon: With the permission of the Court.

The Court: Yes. All right.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. Did Winckler & Smith process any five and a half-ounce size cans for Silzle during the year 1951 into single-strength orange juice? A. Yes.

Q. And were those cans that were thus processed handled in the same manner as you have indicated the other size were handled that were so processed by Winckler & Smith? A. I believe so.

Q. And they were also handled in the same manner with reference to the payments made to Exchange Orange under the contract, is that correct?

A Yes.

Mr. Dixon: Thank you.

Thank you, counsel.

(Testimony of Robert Victor Clark.)

Cross-Examination
(Resumed)

By Mr. Williams:

Q. What information did you receive about the sales of products by Silzle in your capacity with the company?

A. In conferences with our sales department.

Q. Did those conferences discuss the price at which the products were to be sold?

A. Yes. [857]

Q. About how often were those conferences held in 1951?

A. Informally several times a week.

Q. Did you also see the invoices of the sales during 1951 made by Silzle? A. Yes.

Q. Did those invoices show the individual price at which the products were sold, or did they merely show so many cases in a total amount?

A. No, it shows the individual size and price received.

Q. Did you review those invoices before coming to this courtroom? A. Very hurriedly.

Q. Tell us the extent of your review.

A. I checked the sales register and tried to pick out an in-state sale as well as an out-of-state sale. [858]

Q. For what period did you check?

A. I believe from August through February or March of 1952.

(Testimony of Robert Victor Clark.)

Q. What is your sales register, what appears on the sales register?

A. The date of sale, customer invoice number, and the amount sold, the gross amount, and other debit and credit items that might appear as part of the transaction.

Q. Does the individual price per case appear on your sales register? A. No.

Q. Now, tell us what check you made. I have interrupted you. Did you finish your answer about the check of the sales register? A. Yes.

Q. Did you make any other check relative to prices before you came to the courtroom?

A. No. Only the sales register.

Q. And that did not show the individual prices of the cases, is that correct?

A. It showed the amount of sales in dollar volume and the number of cases sold, or dozens, as it might be.

Q. But did not show the individual price per case? A. No.

Q. Did you check what those individual prices were per [859] case by calculating them from the data on the sales register? A. Yes.

Q. And for what period did you do that?

A. August through March of 1952—August, 1951, through March of 1951, I believe it is.

The Court: March, 1952?

The Witness: No. Through May, 1952. I am sorry. August through May, 1952, August, 1951, through May, 1952.

(Testimony of Robert Victor Clark.)

Q. (By Mr. Williams): Did you then compare those prices with the prices set forth in Exhibit 25?

A. Very hurriedly.

Q. And will you tell us the result of that comparison? A. Basically the same.

Q. When you say basically, what do you mean by basically?

A. In the same range. I couldn't compare them exactly as I do not have the exact information for my comparison. I just took spot checks from the sales register. The amount shown on the exhibit would be the exact amount of cases sold. The check of the sales register was to refresh my memory.

Q. Did all of the prices you found on your sales register, that you calculated from the sales register, check identically with Exhibit 25, or were there variations? A. There were slight variations.

Q. So that the Silzle Company did not sell at precisely [860] the price set forth in Exhibit 25, is that correct?

A. It was basically the same. It wasn't in all cases exactly.

Q. What do you mean by basically?

Mr. Dixon: Counsel, I object. I think that question has been asked and answered at least twice.

The Court: Overruled.

Q. (By Mr. Williams): Will you explain more precisely what you mean by basically?

A. It was patterned after the same prices. There were occasions when it might be sold for more or less to the customer.

(Testimony of Robert Victor Clark.)

Q. Did you have any discussion with anyone at Exchange Orange about whether Silzle was to follow precisely the prices stated in Exhibit 25?

A. I had no discussion with anyone at Exchange Orange.

Q. Did you have any discussion with Mrs. Silzle about whether you were to follow the precise prices set forth in Exhibit 25?

Mr. Dixon: If the Court please, this witness did not sell these products. He is not the sales manager of this company.

The Court: I know, but he is an officer. Overruled.

Mr. Dixon: If he knows, he can testify.

The Witness: I don't recall having any conversation with [861] Mrs. Silzle to that extent.

Q. Did you have any understanding on the subject as to whether you were or were not to sell the products at the prices stated in the Exhibit 25?

Mr. Dixon: I object to the question, your Honor. He says whether you—meaning this witness—were to sell.

Mr. Williams: Whether the Silzle Company was to sell.

The Court: Since we are being technical about objections, the question calls clearly for his conclusion, did you have an understanding? If you want to go into some conversation, all right. I sustain the objection on that ground.

Q. (By Mr. Williams): Is it correct you had

(Testimony of Robert Victor Clark.)

no discussion with anyone concerning the prices at which Silzle was to sell with respect to the prices stated in that Exhibit 25?

A. Discussions with whom?

Q. Anyone at the Silzle Company or at Exchange Orange?

A. I don't recall any specific discussion.

Q. Do you know whether any authority was obtained from Exchange Orange to take the Exchange Orange fruit supplied to you under Exhibit 25 and have it processed by Winckler & Smith Citrus Products Company?

Mr. Dixon: I object to the question, if it please the Court. I don't want to be technical, but it obviously is improper as to form, "authority." I have no objection to any [862] question about conversation.

The Court: Well, treat it as a preliminary question. Overruled. You may answer.

The Witness: Our agreement with Exchange Orange included a 12-ounce pack and we had no line, and we had it processed at Winckler & Smith. We did not discuss it with EOP. [863]

Q. Do you know whether EOP knew that the fruit was being processed at Winckler & Smith?

A. I don't know whether they were aware of it.

The Court: Did you say 12-inch or 12-ounce?

The Witness: 12-ounce.

Q. (By Mr. Williams): I am not sure I understood your testimony correctly. Did you testify that in calculating the amounts to be paid Exchange Or-

(Testimony of Robert Victor Clark.)

ange, that the deductions were made from the Silzle selling price instead of from the price set forth in Exhibit 25?

A. No. The price as set forth in the exhibit or other oral arrangements that might have been made that are not covered in the exhibit as to the sales price.

Mr. Williams: That is all.

Redirect Examination

By Mr. Dixon:

Q. Just one question, Mr. Clark. Did anyone, to your knowledge, from Exchange Orange inspect or otherwise visit the Silzle plant in 1951 before any oranges were delivered under this oral and written arrangement, Plaintiff's Exhibit 25?

A. I don't recall ever knowing of any visit.

Q. Do you know, Mr. Clark, whether any of the fruit that was delivered by Sunkist to or for Silzle under this arrangement, Plaintiff's 25, was delivered directly to the [864] plant of Winckler & Smith, or was it delivered to your plant and then in turn redelivered to the plant of Winckler & Smith?

A. It was delivered to us, and then rerouted down to Winckler & Smith.

Q. Were there two handlings of the same tonnage of fruit, or was the truck that had the fruit rerouted from your plant to Winckler & Smith?

A. It was rerouted and a new set of papers made

(Testimony of Robert Victor Clark.)

showing a delivery of fruit from Silzle's to Winckler & Smith.

Q. And the driver then of the truck making the delivery would have an order of some kind from either Silzle or Sunkist to make the delivery to Winckler & Smith's plant, is that correct?

A. Only from Silzle's.

Q. Only from Silzle's? A. Yes.

Q. Did Silzle sign for the delivery of the fruit to the Winckler plant, or how was that handled, if you know?

A. It is customary for fruit that is to be delivered to the corporation to be signed by our receiver, and the fruit that came to us that was further diverted was signed by our receiver as received by Silzle's, and then further routed by Silzle's to the Winckler & Smith plant.

The Court: Did you have somebody at the Winckler & [865] Smith plant sign for it when it got there?

The Witness: Yes, their receiver would have shown a receipt of that fruit as part of the trucking operations.

Q. (By Mr. Dixon): Would that receipt go back to Sunkist? A. No.

Q. It would go to Silzle?

A. Silzle's. [866]

* * *

NICHOLAS J. WINCKLER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand. State your name, please.

The Witness: Nicholas J. Winckler.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Winckler?

A. 2201 North Ross Street in Santa Ana.

Q. How long have you lived at that address?

A. About three years.

Q. Where did you reside prior to that?

A. Prior to that I resided in Anaheim.

Q. Do you mind telling the jury how old you are, Mr. Winckler? A. I am 58.

Q. Were you born in the United States?

A. No. I was born in Hungary, in Europe.

Q. When did you come to the United States?

A. 17 years ago. [867]

Q. When did you become a citizen of the United States? A. In September, 1943.

Q. Will you state to the jury what business, if any, you were engaged in in Hungary before you came to the United States?

A. Well, I was engaged in farming and banking and grain wholesale, and we had extensive farm holdings, and in connection with this farm holding

(Testimony of Nicholas J. Winckler.)

we had a number of agricultural enterprises, such as alcohol plants and canneries and flour mills and dairy and cheese factory, everything which had to do with food.

Q. Well, when you were living in Hungary, did you have anything to do with any canning or processing food operations? A. Yes, I did.

Q. Will you state to the jury specifically what your experience was in Hungary, that is, what you did in Hungary in the food processing line?

A. Well, we had two canneries. We canned mainly tomato products, but we canned also some fruit juices. Fruit juices at this time in Hungary were not a major item. They were restricted mainly to beverage bases where water or carbonated water was added and used like orangeade or lemonade. No single-strength juice was canned.

Then we made some meat and vegetable products, and [868] also some fish products.

Q. Directing your attention to the plaintiff, Winckler & Smith Company, when did you become associated with that company, Mr. Winckler? I am referring now to the corporation, the plaintiff in this action.

A. In 1944, it was in December, 1944, it was 11 years ago, my attention was called to the fact that there is a plant for sale in Anaheim and I went out in December.

Q. What kind of a plant?

A. It was a citrus processing plant. It was operated by a corporation named Calton—C-a-l-

(Testimony of Nicholas J. Winckler.)

t-o-n-e, and I don't know if there is an "e" on the end or not.

This corporation, which incidentally is no longer in existence, decided to build a larger plant, a new plant, so they had no use for the leased plant at Anaheim, which was owned by a certain Lash, Incorporated, and it was up for sale. So I started negotiations in December, 1954, and in [869] January——

The Court: '44, you mean?

The Witness: '44, I am sorry.

(Continuing): '44, and in January, '45, I purchased the plant in my own name, and I decided to run the business as an individual business. But the demand was so great in the spring of 1945, and I understood there were a lot of oranges available, that I decided to take in a partner, and formed a partnership named Winckler & Smith Citrus Products Company, which was the predecessor of the corporation. We were incorporated in October, 1945, and commenced operations as a corporation on February 1, 1946.

* * *

Q. (By Mr. Dixon): I will hand you what has been marked for identification as Plaintiff's Exhibit 37, Mr. Winckler, and ask you to state what that is?

A. This is the former plant of our corporation.

Q. When was that picture taken?

A. The picture was taken in summer, 1946.

Q. That was shortly after the corporation,

(Testimony of Nicholas J. Winckler.)

Winckler & Smith, commenced operations at the plant pictured in [870] Plaintiff's Exhibit 37?

A. As a corporation, a year after the partnership was formed.

Q. Is that a representative picture of the plant as it was in 1951 insofar as the exterior of the plant is concerned?

A. Well, it is an unretouched picture, and the only difference between '46 and '51 is that a lot of additions, as far as equipment, have been made during these five years which are not shown on this picture.

Q. But the additions that you refer to, are they additions of equipment in the interior of the building, or—— A. Both.

Q. ——or additions to the exterior?

A. Both.

Mr. Dixon: Plaintiff's Exhibit 37 offered in evidence.

Mr. Strachan: No objection.

The Court: 37 received in evidence.

* * *

Q. (By Mr. Dixon): Mr. Winckler, what office, if any, did you hold in the Winckler & Smith company after it was incorporated and commenced to do business? [871]

A. I became president and general manager.

Q. As such did you have general charge of the operations at the plant, processing operations?

A. Well, I had to perform the customary duties of a general manager, with the help of the other

(Testimony of Nicholas J. Winckler.)

gentlemen that we had in the plant who all had a specialized function to perform.

Q. Will you state to the jury what product or products you processed at this plant when you commenced operations in 1946?

A. Up to 1947 we had the following products: single-strength citrus juices, which is orange juice, grapefruit juice, and a blend of the two. Then we made some lemon juice, and we made so-called citrus cocktail, and we concentrated citrus juices, that was the hot pasteurized concentrate method, which was sold for the trade, not in individual cans, but rather in drums, or for the Government, or the British Ministry of Food, who were purchasers of concentrated orange juice year after year.

In 1947 we added the lemonade to our line, and we sincerely believe that we pioneered the canned lemonade business.

Mr. Strachan: I ask that the witness not volunteer what he sincerely believes, but respond only to the questions that are put.

The Court: Yes. Listen to the attorney and answer the questions that he asks. [872-873]

Q. (By Mr. Dixon): What products did you make in 1947?

A. In 1947, besides the products made formerly or prior to 1947, we started to manufacture canned lemonade.

Q. State, if you will, to the jury whether to your knowledge there was any canned lemonade as a

(Testimony of Nicholas J. Winckler.)

product on the market for sale to the consumer at that time.

A. To our knowledge, nobody canned lemonade prior to us, prior to '47.

Q. Can you state to the jury just what that product was?

A. That product, basically speaking, was the same good old American lemonade known by everyone which consists of lemon juice, sugar and water, but it was the first time that it was all prepared ready for use, put in a can, which can simply had to be opened and you could enjoy the lemonade without adding anything to it or doing anything with it.

Q. Now, coming down through the years 1948 and 1949 and 1950, were there any additional products that were added to the line of the citrus juices that were processed and sold to the trade by Winckler & Smith?

A. In 1949, we started in a very small way to equip ourselves for the freezing and low temperature processing of citrus juices, such as frozen orangeade—I mean frozen orange juice and frozen lemonade, but we really didn't do anything on it until the latter part of 1950 to speak of. [874]

Q. Well, can you state to the jury what additional equipment, if any, was installed in the plant of Winckler & Smith in the years 1949 and 1950 which related to the processing of citrus fruit juices into any kind of product?

A. In 1949 and 1950 we added about $100,000

(Testimony of Nicholas J. Winckler.)

worth of equipment to our plant, the greatest portion of that expenditure was in behalf of frozen concentrated citrus juices.

Q. Did Winckler & Smith commence to make any frozen citrus juice products in the years 1949 and 1950?

A. In 1949 we had what I would call only small test runs. I am sorry for my accent.

Q. Is that what is sometimes referred to as pilot plant operation? A. More or less.

Q. Or was it more than a pilot plant operation?

A. It was more than a pilot plant, but it was a small capacity compared to our single-strength juice capacity.

Q. So that the jury may get some idea of the processing capacity of the plant and this equipment for making frozen citrus juices, will you state to the jury about how many tons might be so processed per day at your plant through this equipment into frozen citrus juice products? [875]

* * *

The Witness: Our frozen capacity was about 50 tons a day, 50 tons of oranges a day, based on a 24-hour round-the-clock operation.

Q. (By Mr. Dixon): Was the product of the processing called frozen orange juice, or what was it?

A. Frozen concentrated orange juice.

Q. Did your plant have any capacity to make any frozen lemon concentrate?

(Testimony of Nicholas J. Winckler.)

A. Well, the same equipment is used for frozen lemon concentrate. However, we didn't make any amount to speak of. We made frozen lemonade, not frozen lemon concentrate.

Q. Under what brand or label, if any, were the products offered, the products that you have described as being processed in the Winckler & Smith plant, offered to the trade?

The Court: We are still in 1949? [876]

Mr. Dixon: Well, for the whole period, your Honor.

The Court: All right.

The Witness: Well, we had a brand name called Ana-Gold, and the most of our products were sold under our own brand name, but we accepted some private label business, too.

* * *

The Court: Private business is where you would sell what you call brights or shiny cans?

The Witness: No, your Honor. We put the labels of our buyers on the can like Iris Foods, Monarch. They furnished the labels and we put them on.

The Court: All right.

Q. (By Mr. Dixon): I hand you what is marked Plaintiff's Exhibit 38 and ask you what that is? A. This little booklet——

Q. Can you just tell the jury in a few words what is contained in Plaintiff's Exhibit 38?

A. They are labels which are wrapped around the cans, meaning of our products. Some cans are labeled and some cans are lithographed. [877]

(Testimony of Nicholas J. Winckler.)

Q. I just want to know what this is.

A. They are can labels.

Q. Are these the samples of the labels which went around the cans containing the products that you have described as being processed and sold by Winckler & Smith from 1945 to and through 1951?

A. They are.

Mr. Dixon: Plaintiff's Exhibit 38 offered in evidence.

Mr. Strachan: No objection.

The Court: 38 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention, Mr. Winckler, to the year 1949, can you state to the jury what the approximate total dollar volume of sales of the products of Winckler & Smith was in that year? A. It was around $1,600,000.

Q. Can you state to the jury approximately what percentage of that total amount of sales was represented by the product processed by Winckler & Smith and sold in states other than the State of California?

A. To my best recollection, in excess of 75 per cent was sold in other states but California.

Q. Directing your attention to the year 1950, will you state to the jury approximately what the total dollar volume [878] of your sales were for products processed and produced during that year?

A. In 1950, our sales were around $1,750,000.

Q. Can you state to the jury what the approximate percentage was of the total production of your

(Testimony of Nicholas J. Winckler.)

products that were sold in that year outside of the State of California?

A. It was less than 1950. If I may look at my records.

Q. I think you may, if you can't state approximately, refresh your recollection.

Mr. Strachan: I would just like to have it understood that anything that he refers to will be available to us for inspection.

The Court: That is correct.

Mr. Strachan: Yes, sir.

The Witness: It was in excess of 50 per cent which was sold outside of California.

Q. (By Mr. Dixon): Will you state to the jury what the approximate total sales of Winckler & Smith were of products processed by it in 1951?

A. It was approximately three hundred or three hundred fifty thousand dollars, I say processed, not the total sales volume, because I don't figure the Florida operation where we purchased.

Q. Then maybe I had better ask you this question: Of the total sales of Winckler & Smith in the year, what were [879] the total dollar sales of all products from whatever source acquired, that were sold by Winckler & Smith in 1951?

A. In 1951 it dropped from $1,750,000 to approximately $600,000.

Q. Now, can you state to the jury what amount of that approximately $600,000 of sales, total sales, made by Winckler & Smith in 1951 were represented by the sales of products processed by

(Testimony of Nicholas J. Winckler.)

Winckler & Smith at its Anaheim plant in California?

A. Approximately $350,000 to $400,000.

Q. What was the source of the balance of such products so sold?

A. We had an office in Florida where other canners—which we maintained, pardon me, for the purpose that other canners should can for us under our label, which in return was sold interstate under the Ana-Gold label.

Q. When was this Florida office of Winckler & Smith opened?

A. It was opened late in fall, 1950.

Q. And the balance, then, of the total sales that you have referred to as having been made by Winckler & Smith in 1951 is represented by sales of those products which were acquired through and sold by the Florida office of Winckler & Smith?

A. That is correct. That wasn't our production. [880]

Q. Winckler & Smith had no processing plant in Florida, is that correct?

A. No, we never had.

Q. And the amount so sold by the Florida office represented the purchases of canned products so sold as shiners or blanks upon which the label Ana-Gold was placed, is that correct?

Is my question clear, Mr. Winckler?

A. Yes.

Some of the merchandise that we purchased was blanks or bright cans, and the manufacturer in

(Testimony of Nicholas J. Winckler.)

Florida placed our Ana-Gold label on the can. On the other hand, a part of the merchandise purchased by us in Florida was private label business. For instance, Safeway's label was placed——

The Court: Safeway?

The Witness: Safeway Stores. Safeway's label was placed on the can, and any other private buyer's label was placed on the can and sold by Winckler & Smith as Florida juice under the buyer's label. [881]

Q. Now, Mr. Winckler, you have mentioned all of these products that were processed and sold by Winckler & Smith. Can you state to the jury whether any one of these products constituted any particular substantial percentage of the total products of Winckler & Smith?

Mr. Strachan: Can we fix the period that is referred to in the question?

Mr. Dixon: Well, starting in——

The Court: We haven't found out what he was producing in 1950 and 1951 yet.

Mr. Dixon: I thought I covered that, your Honor.

The Court: You stopped in 1949.

Mr. Dixon: Thank you.

Q. Will you state to the jury what products you processed in 1950?

A. Well, if my recollection is correct, I covered the frozen orange juice, the frozen lemonade, the canned lemonade. I have not covered the following products yet which we developed partially in 1950

(Testimony of Nicholas J. Winckler.)

and partially in 1951, and that is orangeade and lemonade in the non-frozen form or what is called shelf pack, which does not need any refrigeration.

Q. By shelf pack you mean it is canned and sold to the consumer on the shelf of the retailer?

A. Correct.

Q. From the shelf of the retailer? [882]

A. Correct. And we had orangeade and lemonade and citrus punch. We had these products in two versions. The one which is the so-called ready-to-use, without the addition of any water, where you just open the can and pour, and it is the counterpiece, the counterpart of the single-strength citrus juices.

Then we had the concentrated version in the little 6-ounce cans where 6 ounces made a full quart of orangeade or lemonade or citrus punch. Basically speaking, these products were identical. The one was ready to use and the other was a concentrate.

Q. So that Winckler & Smith produced a single-strength juice product, the concentrated citrus juice product, and a frozen juice product, is that correct? A. Correct.

Q. And in addition thereto, did it make any blended juices of any kind?

A. Yes. I mentioned that before, that we manufactured blend juices, too.

Q. You made those products in 1949, with the exception of frozen products?

A. In 1949 we did not have these beverages.

(Testimony of Nicholas J. Winckler.)

Neither did we have frozen products. Only single-strength juice.

Q. In 1950, was that the year in which the beverages and frozen juice products were added to the Ana-Gold line? [883]

A. Yes. In 1950 we added the beverages to our line, but I testified before that we did very little as far as canning of frozen products is concerned.

Q. Now, directing your attention to the year 1949, Mr. Winckler, of the total amount of products produced, will you state to the jury what the principal product produced by Winckler & Smith was in that year?

A. The principal product was Valencia orange juice, and then Valencia blended juice, a blend of Valencia and grapefruit.

Q. Can you state to the jury approximately what the percentage was of the total production of Winckler & Smith in 1949 that was represented by the single-strength Valencia juice product?

A. Approximately 75 per cent.

Q. Will you state to the jury what the approximate percentage was of single-strength Valencia juice processed by Winckler & Smith in 1950 with reference to the total production of Winckler & Smith of all products in that year?

A. In 1950 it was somewhat less because in 1950 there wasn't as much fruit available than in 1949. I don't remember exactly how much less but it was less.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury what products were processed by Winckler & Smith in 1951?

A. In 1951 we processed some of the products that I [884] mentioned before, such as beverage bases, frozen concentrated orange juice, then the hot pasteurized concentrated orange juice for the school lunch program, which is purchased by the Department of Agriculture, and then we packed some frozen lemonade. We haven't packed any single-strength Valencia juice at all.

Q. In other words, no single-strength Valencia orange juice was packed by Winckler & Smith in 1951, is that correct?

A. That is the only year there was no Valencia pack.

Q. Were the products which you have described as having been processed by Winckler & Smith during the years 1946 through 1951, sold by Winckler & Smith in interstate commerce?

A. Yes, they have been.

Q. And in the years 1949, 1950 and 1951, in particular, the sales so made in commerce were the approximate percentages that you have testified to?

A. Correct.

Q. Now, will you state to the jury from what source you acquired the oranges processed by Winckler & Smith into single-strength Valencia juice during the years 1946 and 1947?

A. Most of the fruit in 1946 and 1947, we purchased from Sunkist.

(Testimony of Nicholas J. Winekler.)

Q. Do you recall the approximate dollar volume of such [885] purchases?

A. I know in 1946 it was around $1,000,000 that we purchased from Sunkist. In 1947, it was substantially less.

Q. Did you make any purchases, that is did Winekler & Smith make any purchases of Sunkist in 1948?

A. Yes. In 1948 we bought, if I recall, around $200,000 worth of fruit from Sunkist.

Q. And did Winekler & Smith make any purchases during the years 1949, 1950 and 1951, of any Valencia oranges? A. Yes, we did.

Q. What was the approximate tonnage during the year 1949, if you recall?

A. Well, of course, I couldn't recall the exact tonnage, but I know that in 1949 we still bought quite a bit of fruit from Sunkist, but not as much than in previous years, and in 1950 we bought less and in 1951 we bought very little. It was always a decreasing volume year after year. [886]

The Court: Now, wait just a minute.

Counsel has asked you about interstate shipment of your goods in '49 and '50. What about 1951? Were your goods sold in interstate commerce?

The Witness: In 1951 our interstate goods were very small and came mainly from our Florida operation, your Honor.

Mr. Dixon: Thank you, your Honor. I thought I had covered that.

(Testimony of Nicholas J. Winckler.)

The Court: But you did sell some goods in interstate commerce?

The Witness: We sold goods in interstate commerce.

The Court: From both ends, California and Florida?

The Witness: From California we sold a little bit of beverages only. No single-strength juice at all, because we didn't have any. What came from California was only beverage.

Q. (By Mr. Dixon): Mr. Winckler, directing your attention to the year 1951, during that year your plant processed no single-strength Valencia orange juice? A. None at all.

Q. But you did purchase some Valencia orange juice or oranges in 1951, is that correct?

A. Yes, at the beginning of 1951, very early, we purchased some Northern California Valencias, which were used to make some blended juice, mixing it with grapefruit. And then at the middle of the season we purchased some Valencia [887] orange juice——

Q. I am talking about Valencia oranges only.

A. We purchased some Valencia oranges in the middle of the season, but we couldn't use them for single-strength juice.

Q. Did you purchase any oranges from any source in 1951 that were thereafter processed into single-strength Valencia orange juice?

A. No.

(Testimony of Nicholas J. Winckler.)

The Court: You say you couldn't use those purchased in the middle of the season. Why?

The Witness: The price was way out of line, your Honor.

The Court: Was there any problem of sweetness about that time of the year?

The Witness: No, there was no problem of sweetness. It was just a problem of price.

Q. (By Mr. Dixon): Mr. Winckler, I think you misunderstood the Judge's question. I think the Judge was referring to those Valencia oranges that you testified you had purchased earlier.

The Court: No. I talked about those in the middle.

The Witness: In the middle of the season.

The Court: He said he bought some early, and then some in the middle, and I was talking about the middle.

Q. (By Mr. Dixon): Will you state to the jury about [888] when you purchased any Valencia oranges during the middle of the season in 1951?

A. Yes. It was in August and September, and probably a little bit in October, still.

Q. What did Winckler & Smith do with those Valencias so purchased?

A. We used these Valencias, and they were small amounts, very small tonnage compared to our former run, we used it either to make hot pasteurized concentrate for the Department of Agriculture, U. S. Department of Agriculture, under the school

(Testimony of Nicholas J. Winckler.)

lunch program, or to manufacture frozen concentrated orange juice.

Q. You referred to this school lunch program purchases of Valencias.

Would you state to the jury what you mean by purchases for the school lunch program?

A. I would be very glad to. I will try to explain it as short as possible.

The U. S. Department of Agriculture has a plan to take care of surplus commodities, like butter and meat products, and fruits, and so on, and these products are manufactured or purchased, depending if it is a processed or not processed product. For instance, eggs don't have to be manufactured. Canned meat products and citrus concentrates have to be manufactured. The Department of Agriculture buys it from [889] the manufacturer, thereby to take off the surplus from the hands of the grower, and then they use it for a very worthwhile purpose and distribute it to the schools all over the United States, so that the school children can have orange juice or meat or cheese or eggs, whatever the commodity might be.

I am not certain, either I should say for a very reasonable price or free. I don't know which one the case is, if the school charges anything at all for it or not, or whether it is a donation by the Department of Agriculture.

Q. What is the fact, if you can state the fact, Mr. Winckler, with reference to the purchase price of those oranges and the price of the product proc-

(Testimony of Nicholas J. Winckler.)

essed therefrom secured by Winckler & Smith from the Government?

A. Well, I will try to answer the question. It is really two questions. One refers to the raw product, the oranges, and the other refers to the finished product.

The finished product is sold to the Department of Agriculture based on bids.

Q. That is the pasteurized concentrated orange?

A. The pasteurized concentrated orange juice. And of course the only way that you can bid is if you know how much you have to pay for the fruit. If you pay more for the fruit, your bid will be higher. If the fruit is lower, then the bid will be lower. So we had one supply for oranges, [890] independent fruit growers, who told us, "Well, we are willing to give you a little fruit for bidding on the school lunch program at $35."

Well, we bid based on the $35 price.

And we were told by the independent fruit growers that other people are going to bid based on the same price, other fruit companies, such as M.O.D. and Sunkist, and so on. So we submitted a bid based on $35, and the bid was awarded to us. When I say it was awarded to us, I don't mean that the whole school lunch program was, but a small portion of it.

Q. You mean the amount that you bid for was awarded?

A. The amount that we bid for, and we bid for

(Testimony of Nicholas J. Winckler.)

an amount by how much oranges were promised to us for that purpose.

Q. Approximately how much was covered by that bid of pasteurized juice, can you state?

A. It is purely an estimate. I think it was in the neighborhood of probably 2500 tons.

The Court: In other words, you used 2500 tons of oranges to make this product that you were selling?

The Witness: To make the concentrate for the school lunch program.

The Court: You don't mean you got a bid awarded for 2500 tons of hot concentrate?

The Witness: No.

The Court: 2500 tons of oranges?

The Witness: Of oranges, yes. Concentrate would be [891] about one-seventh in weight.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Winckler, back to the year 1948, I believe you stated that during that year you did not purchase many or very many tons of oranges from Sunkist, is that correct?

A. Well, 1948, I said that we purchased a substantial amount still from Sunkist.

Q. Yes.

A. We purchased close to 5,000 tons from Sunkist, which incidentally went again into the school lunch program.

Q. Then it was the year 1949 when it was less?

A. Then the tonnage decreased very substantially.

(Testimony of Nicholas J. Winckler.)

Q. From what source did you secure the Valencia oranges in 1949 that were processed into single-strength juice and any other products into which that juice went?

A. In 1949, our main suppliers were the independent fruit growers. [892]

* * *

Q. (By Mr. Dixon): Mr. Winckler, do you know a Mr. Spurber, S-p-u-r-b-e-r?

A. Yes, I do.

Q. With what company was he connected?

A. I understand that he was the chief accountant for the Alameda Street fruit distributing plant of Sunkist, to my best knowledge.

Q. Now, directing your attention to a period on or about the month of June of 1949, will you state to the court if that is the approximate month in which Winckler & Smith began to make preparations for the processing season for Valencia oranges?

A. It was some time in June, 1949, probably the early [895] part of June, 1949.

Q. Prior to that time, June, 1949, and in previous seasons, Winckler & Smith had been acquiring substantially all of its Valencia oranges, processed at the Winckler & Smith plant, from Sunkist; is that correct? A. Most of it, yes.

Q. Did you endeavor as president of Winckler & Smith to continue to make such purchases from Sunkist as the season of 1949 commenced?

(Testimony of Nicholas J. Winckler.)

A. Yes, I did.

Q. Did you have any conversation with Mr. Spurber of Sunkist about that time with reference to that company's supplying Winckler & Smith with any Valencia oranges during the processing season in '49?

A. Not with regard to supplying. With regard to the matter of payments.

Q. State to the jury about when that conversation took place and the substance of your conversation with Mr. Spurber.

A. I talked to Mr. Kelly about the supply of oranges——

Q. This was prior to the conversation with Mr. Spurber? A. That is correct.

Q. Go on.

A. And he said, well, we could get oranges, but as far as the terms are concerned I have to talk to Mr. Spurber about it.

And Mr. Spurber requested that we pay for the oranges [896] strictly cash. As a matter of fact, according to my best recollection, he requested a cashier's check ahead of time that we take delivery of the fruit.

Q. Had Winckler & Smith been buying oranges from Sunkist during the year 1948? A. Yes.

Q. Was Winckler & Smith in reorganization proceedings during that year?

A. Yes, we were.

Q. I believe it has been previously testified in this case by Mr. Kelly that Winckler & Smith had

(Testimony of Nicholas J. Winckler.)

paid to Sunkist every dollar which Sunkist had coming for any fruit delivered to it prior to June of '49, is that correct? A. Correct.

Q. After this conversation with Mr. Spurber, what if anything did you do with reference to securing a supply of oranges for the processing which was done by Winckler & Smith in 1949?

A. Well, we didn't feel too good about these conditions, and at the same time Mr. Ward, Morgan Ward, of the Independent Fruit Growers, came to see me——

Q. Is that the same company as was listed by Mr. Kelly as one of the three companies, I believe, from which oranges might be secured in any quantities in California?

A. You mean Mr. Finley? [897]

Q. Maybe it was Mr. Finley.

A. Yes, that is the same company.

Q. That is the same company that you are now referring to? A. Yes.

Q. Go on.

A. And he came to see me and he said they have fruit and they are perfectly happy to supply us with fruit under normal terms and conditions. I told Mr. Ward, that Sunkist won't sell us except cash on the barrel head, to use a colloquial term. He said, "We will give you the regular five-day credit, and we are confident we will get paid."

So we bought more from the Independent Fruit Growers commencing 1949 than we did from Sunkist.

(Testimony of Nicholas J. Winckler.)

Q. Can you state to the jury approximately what the tonnage was of Valencia oranges processed by Winckler & Smith into citrus juices in 1949?

A. To my best recollection it was a tonnage in excess of 12,000 tons.

Q. Those were substantially all acquired from the source that you have just mentioned, is that correct?

A. I would imagine in '49 probably we acquired 85 per cent from other sources but Sunkist.

Q. Do you know what the average price per ton was for Valencia oranges in 1949? [898]

A. Well, I am not sure, but I think it is—was around $35.00 or $40.00, something around 35, 40, and it is six years ago. [899]

Q. Now, directing your attention to the year 1950, will you state from what principal source you secured the Valencias that were processed by Winckler & Smith into citrus juices in that year?

A. Well, we bought again most of our oranges from the independent fruit growers. As a matter of fact, we bought in 1950 even less from Sunkist than we bought in 1949.

Q. What was the prevailing price, average price, in 1950 for Valencias? Was that a scarce year or a flush year?

A. In 1950, if I recall correctly, there were several price changes during the season. I think we started out something like $30 or $35, and then it went up several times. The juice went up—I mean

(Testimony of Nicholas J. Winckler.)

the fruit went up at a time this $5.00, from $35 to $40, from $40 to $45, and so on.

Q. Did you continue to acquire a substantial amount of your requirements from the same source in the year 1950?

A. Yes, we did. I might mention here that whenever one supplier increased the price, the other supplier followed suit.

Q. Now, Mr. Winckler, I am not certain that I have asked you this question, but will you state to the jury what the capacity of your plant is per day in tons of Valencia oranges for processing into single-strength Valencia juice?

The Court: You said "is." You mean in 1951?

Mr. Dixon: I'm sorry.

Q. Was in 1951? [900]

A. In 1951, our plant capacity on single-strength orange juice was approximately 130 tons on one shift. We had been running at the plant as much as 400 tons in 24 hours.

Q. By that you mean around the clock in three shifts?

A. In three shifts around-the-clock operation.

Q. That would be during the peak of the season when the supply of Valencias would be available?

A. Available.

Q. Available for that operation?

A. Correct.

Q. Will you state to the jury what it would average during the—withdraw that.

Will you state to the jury what the average

(Testimony of Nicholas J. Winckler.)

length of time of the processing season for Valencia oranges was in 1951?

A. In 1951, I think Mr. Finley already said that the southern Valencias started to come in in June, which was used mainly for hot pasteurized concentrate, and then Valencias were available approximately to the middle of November. I think Mr. McCracken said they closed plant operations on November 8, 1951. So for practical purposes, you have June, July, August, September and October, five months. But that varies from year to year.

Q. Depending upon what?

A. Depending on climatic conditions, size of crop, and [901] how quickly they pick the crop from the trees, due to market conditions.

Q. Did your plant process any navel oranges into any products?

A. Generally not, but there are some years when there was a shortage on Valencia juice and where a certain buyer requested that we should offer to them Valencia orange juice in spite of the fact that we called to their attention that navel orange juice is not as desirable as Valencia orange juice because it turns bitter. We had a substantial navel pack in the winter of 1950 which mostly went to Canada, and in Canada they did not object so much to the bitter taste.

Q. Can you tell the jury approximately what the amount in tons of navel oranges were that you processed in 1949?

A. Well, I have here some pencil notes if I may

(Testimony of Nicholas J. Winckler.)

refresh my memory. In 1949, we run just 1,450 tons of navels, something around 1,450. They are approximate figures.

Q. Did you run any grapefruit that year?

A. Yes, we run in excess of 4,100 tons of grapefruit in 1949.

Q. Approximately how many tons of navels did you process in 1950?

A. In 1950, as I mentioned before, we had our largest navel tonnage amounting to 3,800 tons.

Q. I am not certain whether I asked you, but could you [902] state to the jury what the reason was for that run in 1950 as against the tonnage you processed in 1949?

A. The reason was twofold. In the first place, there wasn't enough Valencia juice available. The inventories on Valencia juice were depleted in both Florida and California. On the other hand, there were plenty of low-priced navel oranges available and the navel juice was used, so to speak of, as a substitute, the next best thing available.

Q. In other words, that was the year that the price of oranges was up over what the price was in 1949? A. Well, this navel tonnage was——

Q. I am talking now about Valencias, the price of Valencias.

A. The price of Valencias went up in 1950 considerably. [903]

Q. Now, approximately how many tons of grapefruit did you process in 1950?

A. Again, around 4,500 tons.

(Testimony of Nicholas J. Winckler.)

Q. Did you process any lemons that year?

A. In 1950 we processed some; not an important amount.

Q. Directing your attention to 1951, can you state the approximate amount of navels processed by Winckler & Smith in that year?

A. It was very nominal. Only 750 tons.

Q. Can you state to the jury the approximate tonnage of Valencias that were processed by Winckler & Smith that year?

A. Well, the Valencia tonnage was down to approximately 5,000 tons.

Q. And the approximate amount of grapefruit that was processed into juice that year?

A. Around 3,100 tons.

Q. Will you state to the jury what product was processed from the 5,000, approximately 5,000 tons of Valencia that you processed in 1951?

A. Yes. We processed approximately half of this tonnage into hot pasteurized concentrate, which went to the school lunch program.

Q. That was the program you described this morning?

A. That I described this morning. And the other half [904] of the tonnage, about the other 2,500—and I would like to mention it is very approximate, I could be off a few hundred tons one way or the other way—went into frozen concentrated orange juice.

Q. So that at the Winckler & Smith plant in

(Testimony of Nicholas J. Winekler.)

1951 there was no single-strength orange juice processed, is that correct?

A. We didn't can a single case of single-strength Valencia juice.

Q. Mr. Winekler, can you state to the jury from your knowledge of the operations of Winekler & Smith during the year 1949, whether an operating profit was made by Winekler & Smith in that year?

A. Yes, it was.

Q. Can you state to the jury approximately what the amount of the profit was?

A. It was in excess of $120,000.

Q. Can you state from your knowledge of the operations of Winekler & Smith in 1950 what the approximate profit of the company was in that year from its operations?

A. Profit was down in '50, because we run less Valencia. It was around $40,000.

Q. Can you state to the jury, from the basis of your knowledge of the operations of the company, approximately what the profit, if any, was in 1951 from the operations of your company? [905]

A. In 1951 we lost money.

Q. Can you state to the jury what the amount of that purported loss was, approximately?

A. Yes. The loss was substantial. We lost around $184,000.

Q. Going back to the year 1949, Mr. Winekler, that was the year that Winekler & Smith was operating, shall we say, out of reorganization?

A. Correct.

(Testimony of Nicholas J. Winckler.)

The Court: The reorganization occurred in '48?

The Witness: Correct.

The Court: Was it completed in '48?

The Witness: Well, technically the settlement was approved, if I recall, in January, 1949, which left us the better part of '49 to operate.

Q. (By Mr. Dixon): As a result of that reorganization did Winckler & Smith owe any money to the RFC or the Reconstruction Finance Corporation?

A. We had an $100,000 RFC loan, which we borrowed in January, 1947, and that loan was paid down—it was an amortized loan—it was paid down to $90,000, approximately $90,000, by 1948, when the corporation went into reorganization under Chapter 11. So that was the balance that we owed to RFC when we completed the reorganization in January, 1949. [906]

Mr. Strachan: Just for clarification, your Honor, I would like to have him state the balance as of the date of the completion of the reorganization proceedings.

The Witness: That is identical. There was no payment made during the reorganization.

Mr. Strachan: I see. Thank you.

The Witness: So when we went into reorganization I think the balance was approximately $90,000, and when we came out the balance was exactly the same.

Q. (By Mr. Dixon): I believe you testified that in the years 1949 and '50 Winckler & Smith in-

(Testimony of Nicholas J. Winckler.)

stalled some additional equipment in its plant at Anaheim? A. That is correct.

Q. What was the approximate amount expended by Winckler & Smith during those years for new equipment? A. It was in excess of $100,000.

Q. Was that equipment paid for or was it——

A. It was all paid for in cash.

Q. And represented new equipment that was put into your plant to expand the operations of Winckler & Smith in the frozen field and the other products that you mentioned this morning?

A. Yes. Not so much to expand; I rather like to use the expression to keep up with changing times and equip ourselves at least in a modest way that we shouldn't be [907] left out completely from the frozen concentrate field.

Q. During the years 1949 and '50 following the reorganization, did your company, the Winckler & Smith company, spend any money, that is, for advertising the products? A. Yes, we did.

Q. Can you state the approximate amounts spent for direct advertising, Mr. Winckler?

A. My recollection is that in '49 and '50 we spent for directing advertising, that means newspaper and television and radio and so on, in the neighborhood of $50,000.

Q. Apart from the direct advertising paid by Winckler & Smith in those years, did Winckler & Smith make any allowances, advertising allowances, to the purchasers of its product?

A. Well, I would put it that way: We had con-

(Testimony of Nicholas J. Winckler.)

siderable sales promotional expenses, inasmuch as that we introduced a number of new products, like I mentioned before, these beverage bases, and then the frozen products, and that includes traveling expense and advertising allowance, based on co-operative advertising with the chain stores, and so-called stack or display allowances. That is about the most important part of it. [908]

Q. That is in addition——

A. That is in addition to the $50,000.

Q. ——to the direct advertising by the company itself?

A. That is correct, and I forget to mention, also, store demonstrations.

Q. And that type of advertising is paid for by the company whose product is being advertised, is it, at least part of it?

A. Oh, yes, the seller. Our company had to pay all for these expenses.

Q. Do you know approximately how much dollars that item would represent in 1949 and 1950, approximately?

A. Well, according to my best recollection, I would say it was probably almost as much as the direct advertising, an additional $50,000.

Q. Now, did Winckler & Smith in 1950 or the early part of 1951 have any program for securing any additional capital for its operations?

A. Yes, we did.

Q. Will you state to the jury what that program was in substance?

(Testimony of Nicholas J. Winckler.)

A. Well, that program had a double purpose. The only way we could complete our reorganization during 1948, that we had to sell our plant on a lease-back arrangement, which is rather customary with other industries, too, and we found [909] that the lease-back arrangement didn't work out too well. It was a little too expensive for us. So we were very eager to get the plant back, I mean for the corporation, to save the lease that we paid.

Q. By that you mean that you were paying rental for the property?

A. We were paying rental for the plant. So I negotiated a deal with the people who owned the plant at this time, with the lessors, and I suggested a convertible preferred stock issue which, of course, has preference ahead of the common shareholders, and we had a tentative arrangement that in consideration of so much stock and so much cash we would get title back to the plant subject to the then existing unpaid balance which we owed to the RFC. That amounted to, roughly speaking, $150,000 plus the RFC loan.

Such an arrangement was originally provided for in the agreement by which Winckler & Smith sold the plant to the lessors.

An option was provided in this agreement, but the option called for a cash consideration and we didn't have the cash, and even if we would have had the cash, we wouldn't want to deplete our cash, so we were successful of talking in the lessor to

(Testimony of Nicholas J. Winckler.)

accept preferred stocks as a consideration or part consideration for the plant.

Now, that took about 130 or $132,000 worth [910] of preferred stocks.

We obtained the permit from the Division of Corporations——

Q. Now, just a minute, Mr. Winckler.

The Court: Was anything paid on the RFC loan after you came out of reorganization in 1948?

The Witness: Yes, your Honor. We paid in two years to the RFC approximately $40,000, which brought the balance down from $90,000 to approximately $50,000.

The Court: $50,000 when?

The Witness: $50,000 in—that was the balance that was paid down in the summer of 1951. [911]

* * *

Mr. Dixon: That's right. Plaintiff offers Exhibit 39 in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 39 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 39.)

Q. (By Mr. Dixon): Now, Mr. Winckler, will you state to the jury how the products that you have described as having been made by Winckler & Smith Company were sold?

A. Most of our products were sold through food brokers who sold the products to chain stores, super

(Testimony of Nicholas J. Winckler.)

markets, superettes, and wholesale grocers and jobbers. Some of our Florida products which were packed for us were sold directly to chain stores without a broker.

Q. Now, as president of Winckler & Smith during the year 1951, are you familiar with the costs incurred by Winckler & Smith in that year, or based upon previous years? A. Yes, I am.

Q. Can you tell the jury what the cost to Winckler & Smith was approximately for processing a ton of Valencia oranges into Valencia orange juice in 1950? [912]

So that my question may be clear, I am not referring now to the price or cost of the fruit. I am referring to the manufacturing costs, shall we say, or processing the oranges into the juice where they will be in a can ready to put on the market.

A. Well, our costs were comparable with other citrus processors. [913]

Mr. Strachan: I object to his stating comparability. I think the proper way to show this would be to make a showing of what the respective costs are.

The Court: The objection is sustained.

The answer may go out. That is your conclusion that they are comparable. Tell us what your costs were?

The Witness: Our costs were $1.35 of one case of 12/46 ounce orange juice or grapefruit juice, or any citrus juice, based on a reasonable seasonal pack, based on a volume.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Pardon me. Was that $1.75?

The Witness: $1.35.

Q. (By Mr. Dixon): In other words, Mr. Winckler, I believe in 1950 you testified that you processed about—what was it, how many tons of Valencias?

A. In 1950 we processed 8,300 tons of Valencias.

Q. Can you explain to the jury what the operating capacity, per tons, of your plant would be upon which these figures are based? Do you understand what I mean? A. I understand.

Q. In other words, in 1949 your production, if I recall your figures, was in excess of some 12,000 tons? A. Correct. [914]

* * *

Q. (By Mr. Dixon): So there will be no question about it, Mr. Winckler, will you state to the jury what the approximate amount per tons of Valencia oranges were processed by Winckler & Smith into citrus juices, single strength Valencia juices, in 1949?

A. In 1949 we bought and processed approximately [916] 12,700 tons. Now, the greatest portion of that tonnage went into single-strength Valencia orange juice. I don't know what portion, it was a very small portion of the 12,700, went into concentrate.

Q. I believe I asked the same question—if I didn't, I will ask it again—with reference to the

(Testimony of Nicholas J. Winckler.)

approximate total tonnage of Valencias processed by Winckler & Smith in 1950?

A. Correct. In 1950 the tonnage that we purchased is identical with the tonnage that we processed.

Q. Which is how many tons?

A. 8,300, approximately. In excess of 8,000 tons.

Q. And I think you have already covered the tonnage for '51 and explained it?

A. Not completely.

Q. Of Valencia oranges?

The Court: Yes, he covered that. 750 tons of navels, 5,000 tons of Valencias, 3,100 tons grapefruit.

Q. (By Mr. Dixon): Now, getting back to my question, Mr. Winckler, can you state from your knowledge of the operations of Winckler & Smith whether there is any substantial variance in the cost of processing a ton of oranges into single strength juice, and into 12/46's, a case of 12/46's?

A. Yes, there is a very substantial difference.

Q. Will you indicate what you mean by that to the jury? [917]

A. The $1.35 manufacturing cost based on one case of 12/46 ounce cans of orange juice, that $1.35 is based on a normal pack.

On a normal pack, I mean that the plant can be in production at least two shifts for a period of three, four months. Otherwise the cost increases substantially.

(Testimony of Nicholas J. Winckler.)

Q. I take it the costs that I asked you about are based upon the 1950 operations of your company?

A. No. Our costs have been based on the operation of a number of years. A typical year would be, for instance, the 1949 operational year.

Q. That was the year in which there was 12,000 tons?

A. Over 12,000. In 1950 our cost would have been substantially higher than $1.35.

Q. Will you explain to the jury why this cost may vary depending upon the amount processed? It may be obvious.

The Court: We have had this before. If you produce one case of orange juice it is going to cost you more than if you produce a million cases. You heard that testimony from Mr. Finley.

Is that substantially correct?

The Witness: That is correct.

In 1951 we didn't run a single case, so our overhead wouldn't be allocated. [918]

* * *

Q. (By Mr. Dixon): Based upon your experience in processing single strength juice from Valencia oranges over the period of years and the average operations, processing operations of Valencia oranges into single strength juice during those years, excluding the year 1951, in which you were in charge of those operations, will you state to the jury, if you can, what the cost is of producing a case of single strength Valencia orange juice to the

(Testimony of Nicholas J. Winckler.)

size of 26-ounce cans? By cost. I mean the entire cost of operations.

Mr. Strachan: I don't think the question is fair. It is objectionable because it doesn't specify particular years that are being averaged.

Mr. Dixon: Yes, it does, counsel.

The Court: I take it the question refers to beginning in 1946 and the question expressly excluded 1951. The objection upon that ground is overruled.

Q. (By Mr. Dixon): Can you indicate to the jury, Mr. Winckler, what the cost per ton would be?

A. I believe I mentioned that we figured as cost $1.35 per case based—I like to choose my words very carefully, not to use the word normal.

Q. Just answer the question.

The Court: Let him finish now.

Mr. Dixon: All right, your Honor. Go ahead.

The Witness: Based on a volume operation which is in a [920] normal proportion with our plant capacity.

The Court: Now, right there, let me ask a question. You see, that doesn't tell us anything, because we don't know what normal operation in your plant capacity would be. Now, how many tons a year, if we can ask it that way, would be a normal operation of your plant capacity, say, in 1950?

The Witness: In 1950, your Honor, I would say at least 12,000 tons.

(Testimony of Nicholas J. Winckler.)

The Court: In 1950, had you put this new equipment in?

The Witness: The new equipment was not put in—we are talking about so-called single strength juice now.

The Court: I see.

The Witness: And that new equipment was for freezing.

The Court: It did not affect it?

The Witness: It did not affect it.

The Court: So your answer would be the same for 1951?

The Witness: Correct.

The Court: The next question is, what did you mean by normal operation of your plant?

The Witness: By normal operation, I mean we should be in operation for at least three months and should be able to run the plant consistently at least five to six days a week.

The Court: And how many shifts?

The Witness: I would say two shifts.

The Court: For all that time? [921]

The Witness: All the time. Let me correct myself. The first few weeks and the last few weeks, one shift, and at the height of the season two shifts or three shifts.

The Court: Now, Mr. Strachan, you don't know me like these other men do, but if you want to object to my questions, you are free to do so. You have that right.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I think these questions were very helpful.

The Court: I want to know as we go along, and I ask these questions—you weren't here yesterday, but I told the jury and I will tell them again, when I ask questions, it doesn't indicate I have any view on the facts one way or the other. I merely try to understand the case as we go along, and if I am confused, I think maybe some juror is.

Mr. Strachan: Well, your Honor, let me interject a question now and then for clarification, too. I think we are all trying to get a clear picture.

The Court: That's all we want.

Q. (By Mr. Dixon): Now, will you explain to the jury, Mr. Winckler, how you compute or arrive at this figure of $1.35 a case?

A. The figure of $1.35 a case is essentially made up by the following components. First, the cost of supplies. By cost of supplies, I mean the cans, the cartons and the wrap-around labels.

Second, the actual labor expended in behalf of the [922] operation.

Third, the overhead, and the overhead is a very big factor because the overhead goes on, of course, regardless if we are operating or if we are not operating.

Q. And those items that you mentioned add up approximately to the figure that you have stated?

A. Yes, based on a satisfactory operation as we explained before.

The Court: Now, you use the word satisfactory.

(Testimony of Nicholas J. Winckler.)

but by that you mean what you have described as a normal operation in view of your plant capacity?

The Witness: Correct, your Honor.

The Court: All right.

Q. (By Mr. Dixon): So that the jury may perhaps get an even better idea of this, can you break this $1.35 per case item apart and show what amount you allocate to these items, approximately?

A. Well, I could do it if I have a little time. I really don't like to use approximate figures, because they could distort the picture and that is the job of a cost accountant. I have these figures at home and when I am called to the stand again, I could——

Q. Well, maybe we could move along. I am sure Mr. Strachan will want to know how you arrived at that figure, so if you will get that [923] information——

A. I like to be careful of these figures. [924]

* * *

Q. (By Mr. Dixon): Mr. Winckler, do you have anything now that you can refer to that will indicate how you arrived at the $1.35 per case figure? A. Yes, I do.

Q. Will you do so and indicate to the jury how you arrived at the figure you gave, then, of $1.35 per case?

A. I had a chance, your Honor, to look into some papers during the recess, and I can break it down, if the court so desires. [925]

(Testimony of Nicholas J. Winckler.)

The Court: That is not the question. The question is do you have some document on which you have these figures?

The Witness: Mr. Dixon has.

Mr. Dixon: Now I am a little bit confused.

You say I have the document, Mr. Winckler?

The Witness: I am referring to the sheet that you turned over to Mr. Williams for photostating.

Mr. Dixon: Then I will have to get it from Mr. Williams.

Mr. Williams, will give it back to me?

Q. (By Mr. Dixon): Is this the document you are talking about?

A. Yes, that is the document.

Mr. Strachan: May we have the document marked if it is going to be referred to?

Mr. Dixon: I am not going to introduce it in evidence.

The Court: It may be marked for identification.

The Clerk: Plaintiff's Exhibit 40 marked for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 40 for identification.)

Q. (By Mr. Dixon): I am handing you, Mr. Winckler, what has been marked as Plaintiff's Exhibit 40 for identification purposes and ask you if that refreshes your recollection or indicates to you in any way how you arrived at the figure [926] $1.35? A. Yes, it does.

Q. Will you now proceed to break down that

(Testimony of Nicholas J. Winckler.)

figure of $1.35 per case into its component parts, if there are any?

A. Yes. Before I proceed may I state that I am talking about 1951 prices, which changed substantially since then.

In 1951 the packing cost, which includes the cans, cartons and label, amounted to 83 cents for a case of 12/46 ounce. The general factory overhead, which was allocated to a case was approximately 40 cents; and the factory labor and other miscellaneous expenses, 12 cents. 83, 40, and 12 totals $1.35.

The Court: Let me see this document.

Go ahead.

Q. (By Mr. Dixon): I am going to show you —I don't think we can mark this one for identification, ladies and gentlemen—I am pointing to a 12—will you tell the jury what size can that is?

A. That is a 46-ounce can.

Q. Is that the size can that you are talking about? A. That is correct.

Q. Exclusive of the cost of the oranges, it costs, does it, $1.35 to put the juice into this can with the label on it ready to move into the stream of commerce to the consumer? [927]

A. Without the contents, without the juice itself, $1.35, in 1951.

A Juror: May I see it?

Mr. Dixon: I am advised——

The Court: Wait a minute. Do you offer it as an exhibit?

Mr. Dixon: Yes.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I have no objection to him letting the jury see it.

The Court: Exhibit 41 received in evidence.

* * *

Q. (By Mr. Dixon): This is the standard 46-ounce size, Mr. Winckler?

A. That is correct.

Q. And it takes 12 of those to make a case of 12/46's? A. That is correct.

Q. This $1.35 is the cost of a case of 12 of these 46-ounce cans filled with juice, is that correct?

A. Filled with juice, I am sorry——

Q. I mean excluding the juice. [928]

A. Excluding the juice cost.

Q. But it does include the cost of putting the juice into the can?

A. It does. But it does not include the juice cost itself.

Q. Will you state to the jury about how many gallons of single strength juice are contained in a case of 12/46's?

A. It is 4.31. My memory isn't so good as Mr. Finley's. I know it only to one or two decimal points. 4.31.

Q. And about how many cases of 12/46 ounce cans could be made from the average ton of Valencia oranges? A. Approximately 23.

Q. Will you indicate, Mr. Winckler, if you can, from your knowledge of the operations of the Winckler & Smith Company plant, and the processing of Valencia oranges into single strength juice,

(Testimony of Nicholas J. Winckler.)

what the cost of the juice would be in a case of 12/46 ounce cans of Valencia orange juice?

A. Mr. Dixon, I don't know if I misunderstood the question. I can answer it only if you tell me based on what fruit price. Did you mention a fruit price?

Q. I thought we had been talking—Mr. Finley and everyone else—about a $40 cost per ton of fruit, which would produce 120 pounds of soluble solids. A. In 19——

Q. And it would also produce 100 gallons of single [929] strength Valencia juice.

A. In 1951, to my best recollection the average solid content was in the neighborhood of 130 pounds soluble solids per ton, which on a $40 base price would indicate a $44 fruit price. Out of a $44 fruit price the content for a case of juice would cost approximately $1.90.

I have figured that out previously, so I remember the figure very well. We multiply 44 by 4.31, and we get a round figure slightly under $1.90. [930]

Q. Now, we have this case of single strength Valencia juice in the case and ready to go to the market, or in storage, ready to go to the market. Are there any further costs that are or must be added to the cost items that you have just mentioned? A. Yes, there are.

Q. Before this case reaches the buyer?

A. Yes, there are.

Q. The buyer of Winckler & Smith?

A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury what those items are and the approximate amount, if you can, per case in 1951?

A. Well, there is a conditional expense of labor depending on if you are storing your stock bright and you have to handle it a second time and put on a buyer's label. That is a conditional expense.

An unconditional expense is the expense of sales, which includes brokerage, cash discount, and the expense of our own sales department, and then there is expense of modest advertising.

Q. Can you include all of those items under sales expense, Mr. Winckler?

A. Yes. I think——

Q. Can you tell the jury approximately how much that expense would be per case? [931]

A. A case so produced would have to sell close to $4.00——

Q. No, no. Just answer my question. Will you tell the jury what the approximate sales expense would be per case?

A. Yes, Mr. Dixon, but in order that I can answer that——

Q. All right. I didn't mean to interrupt you.

A. I have to get down to the cost that I take, 7 per cent or 8 per cent sales expense. The sales expense is figured on the gross sales price. So taking 8 per cent sales expense as an example, I have to determine first for how much the juice would sell. So let's assume the juice would sell for $4.00. Then I have to figure 8 per cent of the $4.00, which is 32 cents, I cannot determine this without taking

(Testimony of Nicholas J. Winckler.)

the gross sales price into consideration.

Q. Let's take a sales price of $2.50 per case of 12/46's. Can you tell the jury——

A. Mr. Dixon, I can't, because the two items that I stated already, the $1.35——

Mr. Strachan: Just a moment.

The Witness: ——and the $1.90——

Mr. Dixon: Just a moment.

Mr. Strachan: I move to strike everything following the answer, "I can't." [932]

The Court: It may go out and the jury will be instructed to disregard it.

Q. (By Mr. Dixon): Will you proceed, Mr. Winckler, with your answer based on what you started to——

Mr. Strachan: There is no question pending. I would like to have a question put.

Mr. Dixon: I will put it again, counsel.

Q. Will you state to the jury what the approximate sales cost per case would be for selling a case of 12/46's of single strength Valencia juice?

A. Depending on how much profit the manufacturer expects to make, it would vary between——

Mr. Strachan: I object. The witness obviously doesn't understand the question. He is talking about how much profit the manufacturer would make.

The Court: Well, now, just a minute.

Mr. Strachan: I move to strike the answer.

The Court: The motion is denied. But I think the question should be more specific. You haven't indicated whether it is 1951. You haven't indicated whether it is on the basis of this computation we

(Testimony of Nicholas J. Winckler.)

have been going through, and you haven't indicated —well, that's enough.

Mr. Dixon: You are quite right, your Honor.

Q. I have naturally been assuming, and apparently it wasn't in the question directly, that we are dealing with [933] 1951, and we were adding the sales cost to the two other cost items for the case you have previously testified to, Mr. Winckler.

A. Correct.

Q. Now, based upon that assumption and those factors, can you tell the jury what the sales cost would be that would be added to these items to get the figure that I have asked you to give?

The Court: The question that way leaves out the question of profit. In other words, you have asked him to add the selling cost to his $1.35 for production and his $1.90 for juice, and your question involves a sales price.

Mr. Dixon: Correct.

Q. With no consideration of profit, Mr. Winckler, at all. We are dealing in all these cases with the cost to Winckler & Smith, without a computation or consideration of any profit in the sale.

A. Now, just one second, please.

Without any profit, the sales cost would be $3.53.

Q. You mean the total sales cost?

A. The sales cost, 28 cents——

Q. The total cost?

A. Yes, the sales cost 28 cents, and the total sales cost of a can of 46-ounce, 12/46 ounce canned orange juice would be $3.53, not allowing anything for profit. [934]

(Testimony of Nicholas J. Winckler.)

Q. Well, I think we finally have this answer out, Mr. Winckler. That price includes all of the cost items that have been described as going into the production of this case of 12/46's?

A. No. I answered only the question that includes the manufacturing cost and——

Mr. Strachan: Just a minute. The answer is "No."

The Court: Well, let him explain the answer. Objection overruled.

Q. (By Mr. Dixon): Will you explain the answer?

The Court: I thought he had everything there. Now he says he hasn't. Let's find out what he left out, if anything.

The Witness: May I state, your Honor, what I have in?

The Court: Yes.

The Witness: We have $1.35 manufacturing cost, we have $1.90 juice cost, and we have 28 cents sales expense, and if my addition is correct, that adds up to $3.53 total. No profit in consideration.

What is not included is advertising, warehousing cost, probably interest under investment while in storage. I think that's it.

Q. (By Mr. Dixon): Now, let me ask you this, Mr. Winckler. Are there any credits that should be applied against this figure of $3.53 by way of recovery to Winckler & [935] Smith of any oil and peel from this ton of oranges?

A. Yes, there are.

(Testimony of Nicholas J. Winckler.)

Q. Can you tell the jury approximately how much that might be per case?

A. Well, oil recovery averaged approximately two pounds of orange oil per ton of fruit. Of course, the price varied, and wherever we sold oil, we couldn't get the top price for it. So that probably should be figured at $1.50.

The Court: A pound?

The Witness: A pound.

The Court: Or for the two pounds?

The Witness: A pound. $1.50 in one year, and there was a year when the oil sold as low as 60 cents a pound.

The Court: Well, that was an abnormally low price.

The Witness: That is correct. In 1951, I think it was closer to $1.50, so for two pounds we may allow $3.00 per ton. Of course, this $3.00 isn't there, because there are production costs involved, which is not included in the price, which I would say is probably in the neighborhood of 30 cents a pound. So on two pounds, the production cost would be 60 cents. If we deduct 60 cents from the $3.00 gross, we would get about $2.40 net recovery per ton of oranges.

The Court: For the oil?

The Witness: For the oil. And for the feed, after deducting manufacturing expenses and other ingredients going [936] into the manufacturing of feed, I would allow for the feed recovery probably an equal amount as the oil. A little less, or $2.00 per ton of fruit. [937]

(Testimony of Nicholas J. Winckler.)

Q. So that would be about 20 cents per case recovery?

A. Two and two forty is four forty. If we divide that by 23—it would be approximately 18 cents per case recovery from by-products.

Q. That amount would be credited against the figure that you have just mentioned?

A. Correct. For practical purposes we may say that it would bring down the $44 fruit price to $40 per ton, or $39.50 per ton.

Q. Mr. Winckler, directing your attention to the 1951 processing season——

Juror Johnstone: What happened to that other item of additional labor and other possible handling?

The Court: What was that?

Juror Johnstone: There was another item mentioned of putting it in storage, with additional labor and possible other handling.

The Court: No figure was given on that. Mention was made of warehousing; interest on material manufactured while in storage, and advertising. No figure was given on that in the $3.53 that was arrived at less the 18 cent credit.

Q. (By Mr. Dixon): Can you state, Mr. Winckler, approximately how much those items would be per case? A small item or a large item per case?

A. I would estimate probably another 10 cents per case. [938]

Q. For those items of storage, cartage, warehousing?

(Testimony of Nicholas J. Winckler.)

A. That is correct. And I have to ask the court's forgiveness. I omitted one other figure.

Q. I thought we had covered everything. But we don't want to omit anything. What did you omit?

A. We omitted the trucking cost of the fruit from the packing house to the plant, which is approximately an item of six to seven cents per case.

* * *

Q. (By Mr. Dixon): That should be added to the production cost figure without profit, that you mentioned? A. That is correct.

Mr. Dixon: Plaintiff's Exhibit 42 offered in evidence.

The Court: Exhibit 42 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibit 42 and ask you to state what that is.

A. That is a mimeographed price quotation of the California Fruit Growers Exchange, Fruit Distributing Plant, over Mr. Kelly's printed name, referring to Valencia prices to processors, dated April 4, 1951. [939]

Q. Was that received by Winckler & Smith Company? A. Yes, it was.

Q. By referring to this exhibit can you state when it was received——

A. It was received—it bears our corporation rubber date stamp on it. It was received on April

(Testimony of Nicholas J. Winckler.)

Q. Did Winckler & Smith purchase any Valencia oranges from Sunkist after they received this price list?

A. Yes, we purchased a very small tonnage.

* * *

Plaintiff's Exhibits 43 and 44 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibits 43 and 44 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibits 43 and 44 and ask you to state to the jury, if you will, Mr. Winckler, what those exhibits are.

A. These exhibits are what we call report of sale [940] slips of Sunkist Citrus Distributing Plant of fruit that we purchased from Sunkist.

Q. By referring to those exhibits can you state to the jury what the price was per ton paid for by the tonnage represented by such exhibit?

A. Yes, we can.

Q. Will you separately state what Exhibits 43 and 44 cover as to tonnage?

A. Yes, I will.

Q. State what Exhibit 43 covers as to tonnage purchased?

A. Exhibit 43 covers one small truck load of 15,820 pounds of Valencia oranges.

Q. What is the date of it?

A. April 19, 1951.

(Testimony of Nicholas J. Winckler.)

Q. What is the price per ton?

A. The price per ton——

Q. Charged for the tonnage represented by said exhibit?

A. It was the early part of the season, the solids were 110.95, and the price per ton was $38.46. These were Northern California Valencias, and therefore we got a trucking allowance of $5 per ton, which was actually paid out.

Q. By hauling allowance, you mean the charge made for hauling it down from the Exchange packing plant?

A. No. That was hauled near Porterville, I mean up north, the truck had to go up from Anaheim, I think it is 220 [941] or 230 miles. It wasn't Southern California fruit; it was Central California fruit. There were no Valencias in Southern California as early as April.

The Court: What do you mean by the trucking allowance of $5? Did that come, then, off of the $38.46?

The Witness: Yes, your Honor.

The Court: Did you send your truck up?

The Witness: No. We paid for a trucking concern. We didn't have our own trucks. That was an overcharge—not an overcharge, I withdraw that—that was an unusually high trucking charge for a 225-mile distance.

Q. (By Mr. Dixon): And that was the reason for the allowance, Mr. Winckler?

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. In other words, can you state to the jury what the usual trucking charge is for Valencias that are delivered from the Los Angeles area or the Southern California area?

Mr. Strachan: I don't think you can generalize on a subject of that sort.

The Court: No. Distances vary too much. We have exhibits in evidence that show various of those distances and charges made by various companies.

But I don't understand this. You told us there was a trucking expense for the fruit from the packing house to the plant, which you said was 6 cents a case?

The Witness: Six and a half cents a case. [942]

The Court: Well, then, ordinarily the processor pays the trucking, does he, from the packing house to the plant?

The Witness: Ordinarily, that is correct.

The Court: And he pays that on top of the price that he pays for the oranges?

The Witness: That is correct, your Honor.

The Court: Well, then, these oranges were $38 a ton, and ordinarily you would pay the trucking on top of that?

The Witness: Yes.

The Court: Did you pay any trucking at all on this?

The Witness: The trucking expense on this fruit, if I recall, was around $6.00 a ton, and $5.00 was reimbursed by Sunkist, so we had there more

(Testimony of Nicholas J. Winckler.)

or less a trucking charge of $1.00 that we had to pay out of our pocket.

The Court: All right.

Q. (By Mr. Dixon): I just want to be sure that the record is clear, Mr. Winckler. This invoice does not represent the trucking charge made to Winckler & Smith and paid for by Winckler & Smith?

A. Correct. Part of the trucking charge.

Q. Well, does this Plaintiff's Exhibit 43 and Plaintiff's Exhibit 44 contain the actual trucking charge paid by Winckler & Smith at the time of delivery of the oranges covered by this invoice?

A. Well, on Exhibit 44, the fruit cost is not identical [943] with Exhibit 43.

The Court: Let's stick with 43 first now.

Q. (By Mr. Dixon): Let's take 43.

The Court: That's all we are talking about.

The Witness: My best recollection is the $5.00, which is called hauling allowance, covers about—that would be 83 per cent of the actual trucking expense. It is my recollection the trucking charge from Central California is $6.00 per ton, so we paid $1.00 per ton and the Exchange allowed us $5.00 per ton out of $6.00.

The Court: Are you through now with 43?

Mr. Dixon: Yes, judge.

The Court: All right. Go ahead.

Q. (By Mr. Dixon): What is the fact, Mr. Winckler, with reference to the trucking allowance on Exhibit 44?

A. On Exhibit 44. the solid content was higher.

(Testimony of Nicholas J. Winckler.)

Consequently the gross price was $43.45, less $5.00 trucking allowance again.

Q. Now, let me get this trucking allowance item clear, Mr. Winckler. Do you want the jury to understand that when this truckload of oranges, for which Winckler & Smith was charged $43.45 a ton, was delivered at the Winckler & Smith plant in Anaheim—— A. Yes.

Q. ——that in addition to the $43.45 charged thereon, [944] Winckler & Smith paid approximately $6.00 for trucking the oranges delivered under Plaintiff's Exhibit 44 to the trucker at the time of the delivery, and this allowance of $5.00 compensates for five-sixths of that amount, is that correct?

A. That is correct. We paid—may I recapitulate in my own words?

Q. Yes, go ahead.

A. We paid $43.45 for the fruit plus $6.00 trucking allowance, which is——

Q. Charge, you mean.

A. Trucking charge, which is $49.45, less $5.00, which brings it down to about $44.45 net cost.

Q. Do these other papers attached to Exhibit 44 have any particular significance other than indicating the basis of the weight and measures? I mean the weight and the soluble content, and so forth?

A. That is a record of the trucker who made the haul, and there is the official certificate of weight of the Porterville, California, city scale.

(Testimony of Nicholas J. Winckler.)

Q. And that is where the load originated?

A. That is where the load originated. And then there is attached a slip to it which is not correct.

Q. Well, what is wrong.

The Court: I think you have a slip in Exhibit 43 that concerns more than this load. I was trying to understand it. [945] Here is a commercial transfer sheet, and the second item refers to a weight of 15,820.

The Witness: Correct.

The Court: That is what is involved in Exhibit 43, isn't it?

The Witness: That is correct.

The Court: But there was also included on that transfer slip another weight of 27,180.

The Witness: That is Exhibit 44.

The Court: So that in 43 there is one slip, the transfer slip, that concerns both exhibits.

The Witness: Correct. I was referring to the slips are not correct. They don't belong to that.

The Court: All right. So the jury will understand these two exhibits, they have the same general type of papers in them. Each has a pink paper from California Fruit Growers, that is Sunkist, but 43 also has another pink slip which concerns the weight involved both in Exhibit 43 and in Exhibit 44. In other words, there was one slip for the two loads.

Q. (By Mr. Dixon): You started to say there was something wrong with one of those. What was it, Mr. Winckler?

(Testimony of Nicholas J. Winckler.)

A. The solids per ton is not consistent with the price.

Q. Well, we won't go into that. [946]

* * *

Mr. Dixon: A juror has a question, your Honor, and I hesitated to answer.

The Court: You did right. What is it?

Juror Johnstone: Does that $5.00 trucking allowance cover the whole load of nearly eight tons, or is it $5.00 a ton?

The Court: The juror asked a question. You have been talking about a figure of $6.00 for trucking and $5.00 allowance. Is that per ton or was that for the whole load?

The Witness: That is per ton. That is correct.

The Court: In other words, the charge was originally $6.00 per ton.

The Witness: Per ton.

The Court: And you got an allowance of $5.00 per ton?

The Witness: Correct.

Q. (By Mr. Dixon): Now, I guess we have that tonnage delivered to Winckler & Smith plant at Anaheim. Do you recall what was done with that tonnage, Mr. Winckler?

A. Yes. At this time we had to finish up a government order of some blended juice. It was going to the Quartermaster, and we used this little tonnage to complete our blended juice.

Q. In any event, this did not go into single-strength [947] Valencia juice?

(Testimony of Nicholas J. Winckler.)

A. No. It would have been too early.

Q. When did the Valencia orange processing season commence in California, shall we say in 1951?

A. Well, some processors are starting earlier, the ones who are manufacturing Valencia orange juice with sugar added, which is so declared on the label. Other manufacturers don't start until such time that the juice reaches the maturity that it can be canned without addition of sugar. The sugar added juice, I would say in 1951 was packed as early as in June.

Q. Did Winckler & Smith process any Valencia juice during the previous years with sugar added?

A. Yes, we had to because we had a demand for it.

Q. Did Winckler & Smith process any single strength Valencia juice with sugar added in 1951?

A. In 1951 we did not process any Valencia juice, neither with or without sugar. [948]

Q. Winckler & Smith was in the primary business of processing Valencia oranges into single strength Valencia juice, was it not?

A. That is correct.

Q. Will you state to the jury what occurred in 1951 as to why Winckler & Smith did not process any Valencia orange juice during that year?

A. The answer is very simple. We had a price of $40 per ton based on 120 pounds solids, which for practical purposes was in excess of $40 per ton, with the haul of the fruit it was $44 to $45 per ton. At the same time our competitors were in position

(Testimony of Nicholas J. Winckler.)

to offer Valencia juice to the trade as low as $2.20 a case. It would have cost us, as I figured out before, to produce it at cost, at least $3.50 to $3.60 a case, so we couldn't afford to buy fruit and sell Valencia juice for $2.20 a case to meet competition.

Q. When did it first come to your attention, Mr. Winckler; that any Valencia orange juice was being offered in the market by competitors at the price you have mentioned?

A. It was some time——

Q. Withdraw that question.

Will you explain to the jury how you start your pack and how you begin to process, and about how this processing starts at the Winckler & Smith plant? Is there any connection, in other words, with the sales program of Winckler & Smith [949] and the processing operation at the plant?

A. Of course there is.

Q. Does Winckler & Smith usually process juice without having orders for it?

A. It does not.

Q. What is the practice with reference to the marketing of the products of Winckler & Smith to the trade? A. I would like to——

Q. Explain that to the jury, please.

A. I would like to answer in the following manner: We adopted a principle since 1946 not to speculate and not to pack any inventories, and fill only firm orders, and our brokers were soliciting orders before the Valencia season started.

Q. May I interrupt you there? Was the Florida

(Testimony of Nicholas J. Winckler.)

single strength Valencia juice about out of the market at this time?

A. Well, Florida always has some inventories left. Some sizes are short or some sizes are sold out, but I couldn't answer the question with a general statement that Florida was out of the market.

Q. My question wasn't quite fair, I realize. Can you tell the jury when the Florida processing season is for single strength juice? I believe we have had some evidence from Mr. Finley on that. I am not sure. [950]

A. Yes, I am glad to repeat. Florida people start processing depending on how crop conditions and climatic conditions are, as early as September or October, and the season gets into full swing by December, and for practical purposes the single strength juice season is over by April in a normal year.

Q. In other words, if I understand your answer, Mr. Winckler, the Florida processing season overlaps to some extent with the California processing season, but it starts—— A. In fall.

Q. ——late in the year, or the fall, and ends early——

A. It ends earlier than the California season starts. However, Florida carries more inventories.

Q. After the end of the Florida processing season for Valencia juice, there is of course some canned Florida juice still in the market that hasn't been sold up to the time, perhaps, that the California processors commence to process their Valencia orange juice? A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. Is that the general condition?

A. That is correct.

Q. All right. Now, will you proceed to indicate how you market your single strength Valencia juice processed at the Anaheim plant here in California?

A. When the Valencia season approaches, our brokers [951] are contacting the trade, and are soliciting orders. These orders naturally have to be competitive (a) with other California canners, and (b) with the Florida price quotations. And in June we got the surprising news through our brokers that other California packers are offering merchandise at a very low price, if my recollection is correct around $2.20 per case. And it doesn't take a mathematician to figure out that you cannot produce, out of $40 oranges, canned juice for $2.20.

Q. Do you know or can you state to the jury what the California Valencia juice had been selling for per case of 12/46's, approximately, that had been sold in the market in the year 1950, and in the early part of '51?

A. Of course the price varied during the year of '50, because the fruit price varied as we stated before, but the last price that I remember in 1950 was in the neighborhood of $3.75, if my recollection is correct.

Q. All right.

A. I am always talking about 12/46 ounce size.

Q. Now, will you proceed to tell the jury about these reports that you got from your brokers concerning the price at which Valencia orange juice was selling in the market in the opening of the

(Testimony of Nicholas J. Winckler.)

1951 Valencia season in California, that is the processing season?

A. I am sorry, I didn't follow that question correctly. [952]

Mr. Dixon: All right. It is a long one. Will you read it, please?

(Question read by the reporter.)

The Witness: Well, to my best recollection most brokers confirmed the fact that other California citrus processors are out with a $2.20 price for a case of 12/46 ounce, f.o.b. plant.

Q. (By Mr. Dixon): Do you know or can you tell the jury what the price of the Florida Valencia juice was at that time, at about the same time? Or was this price only applicable to——

A. The Florida price around then was rather uncertain. You see—let me put it this way: I cannot answer the question with a straight figure. The Florida price in 1950 was gradually increasing, and then suddenly there was—the price collapsed, and then the prices were strictly nominal. There were quotations, but——

Mr. Strachan: Just a minute. I would like, if your Honor please, to have him tell us what he means by nominal.

The Court: Yes.

The Witness: By "nominal," for instance, that a packer would quote a price of $2.35—and I am using that figure only for the purpose of illustration—but there are no takers at that price, so there

(Testimony of Nicholas J. Winckler.)

is no business transacted. The buyer is waiting for the price to come down, and the [953] manufacturer doesn't want to come down with the price. So there are quotations without actual business being transacted.

The Court: That is what you mean by a nominal price?

The Witness: By a nominal price.

The Court: So that nominal price could be any price in the range if business didn't take place at that price?

The Witness: Correct.

The Court: All right.

The Witness: And I am trying to pinpoint the month of June, 1951, that Mr. Dixon asked what the Florida price was. Now, that is the story to my best recollection. I am not 100 per cent definite about the Florida price situation.

Q. (By Mr. Dixon): Directing your attention to the approximate time at which the processing season for California Valencias opened in 1951, did you have any conversation with anybody at Sunkist at that time about the securing of oranges for processing purposes? A. Yes, I did.

Q. And with whom did you have such conversations?

A. I had conversation at various times with the following——

Q. We have to be specific, Mr. Winckler, as to the approximate time of these conversations, and with whom the conversations were had. Now, if you will just keep that in mind. Now, tell the jury

(Testimony of Nicholas J. Winckler.)

about when the first conversation [954] was had during or at about the opening of the processing season for Valencia oranges in California with anyone at the Sunkist company?

A. The first person that I contacted was Sam Kelly.

Q. Approximately when?

A. Approximately in the middle of June.

Q. What was this conversation that you had with Mr. Kelly?

A. The conversation was——

Q. Where did this conversation take place? Was it a telephone conversation?

A. The first conversation was on the telephone. Then shortly after I had a personal conversation going down to his office.

Q. Now, let's just take one at a time, Mr. Winckler. What conversation did you have with Mr. Kelly over the telephone?

A. Over the telephone I told Mr. Kelly, "Is there any change in the fruit price?"

And Mr. Kelly replied, "No, the fruit is still $40 on our regular schedule."

So I said to Mr. Kelly, "Well, you understand the juice is offered for $2.20."

I always mean a case of 12/46 ounce.

Mr. Kelly said, "I heard so." [955]

So I said, "What are we going to do about it?"

So Mr. Kelly said, "Well, why don't you go to Morgan Ward and buy fruit from him?"

So I said, "Now, Mr. Kelly, it isn't the point

(Testimony of Nicholas J. Winckler.)

where I buy the fruit, but you know if Sunkist has a $40 price everybody else has a $40 price."

So he said, "Well, I agree to that, but I have no authorization to lower the price. However, if the $2.20 price is going to hold up, there is a likelihood that maybe the price of the fruit is going to be changed." [956]

So he sort of implied I should wait. It is too early anyhow.

So that is about the essence of the first conversation.

Q. This conversation was over the telephone?

A. Was over the telephone.

Q. When was the next time that you had any conversation with Mr. Kelly?

A. The next time, I would say it was probably 10 days later. I went to see Mr. Kelly in person.

Q. And where did you go to talk to him?

A. I went to his office on Alameda Street.

Q. Was there anyone present at the time of this conversation, to your recollection?

A. No, I don't think so. I was alone with Mr. Kelly in his room.

Q. Will you state what occurred at that time, what was said by you and what was said by Mr. Kelly?

A. Well, that conversation was rather short and abrupt. Mr. Kelly indicated he is acting under——

Q. What did you say to Mr. Kelly and what did he say to you?

A. If there is any chance that the fruit price will

(Testimony of Nicholas J. Winckler.)

be more or less in line with the juice price quoted by other California canners. [957]

And Mr. Kelly said, well, that is decided by the board of directors of Sunkist or by Mr. Wilcox, I mean it is decided with people who are above him. That was the meaning of his statement. And he suggested I should see Mr. Wilcox.

Q. Did you go to see Mr. Wilcox?

A. Yes, I did.

Q. That is the Mr. Wilcox who testified here in the trial, of Sunkist?

A. If Mr. Wilcox will testify or he has testified?

The Court: No. Is that the Mr. Wilcox who testified here?

The Witness: Yes, that is the same Mr. Wilcox.

Q. (By Mr. Dixon): When did you have a conversation with him?

A. Well, I wouldn't commit myself to a date, but it was very shortly after the second conversation that I had with Mr. Kelly.

Q. Was this a phone conversation or was this a face-to-face conversation with Mr. Wilcox?

A. Well, I had with Mr. Wilcox phone conversations and I had also personal.

Q. Which one did you have first?

A. My recollection is that I had a little bit of trouble seeing Mr. Wilcox, because Mr. Wilcox was in the East, and I think it was probably a week or so that was lost before [958] I could see Mr. Wilcox. Mr. Wilcox is a man on a full schedule. He has speaking tours, and so forth. So it could be there

(Testimony of Nicholas J. Winckler.)

was 10 days to 14 days time which elapsed between the time I saw Mr. Kelly and I went to see Mr. Wilcox at the Sunkist Building.

Q. In other words, you called at Mr. Wilcox's office?

A. I called there, yes, for an appointment.

Q. You called for an appointment?

A. Yes.

Q. This was after your conversation with Mr. Kelly in which he suggested you contact Mr. Wilcox? A. That is correct.

Q. And you finally succeeded in meeting Mr. Wilcox in the offices of Sunkist about 10 days to two weeks later, is that correct?

A. That is correct.

Q. And when would that be, approximately? The early part of July?

A. It should be very close around the first of July or the 5th of July, the very early part of July, I would say. [959]

* * *

Q. Mr. Winckler, I believe when we adjourned court the last session you were testifying concerning a conversation or your efforts to contact Mr. Wilcox of Exchange Orange in the early part of 1951 concerning the securing of a supply of oranges for processing purposes in that year.

Did you finally succeed in talking to Mr. Wilcox?

A. Yes, I did.

Q. And about when did that conversation take place and where did it occur?

(Testimony of Nicholas J. Winckler.)

A. At my best recollection, it was around the first of [965] July or the early part of July, and it was at his office.

Q. You mean in the Sunkist Building in Los Angeles? A. That is correct.

Q. Will you state to the jury what the substance of that conversation was? First, was there anyone present, to your recollection, when this conversation took place?

A. I don't recall if there was anybody present, but it could be.

Q. Well, now, will you tell the jury what the substance of your conversation with him was, what you said and what he said?

A. Well, I stated to Mr. Wilcox that certain processors are offering orange juice at the price of $2.20, which is impossible to manufacture from $40 fruit based on 120 solids, and there must be some special arrangement between some processors and Sunkist and, of course, we want to stay in business and we would like to get the same type of fruit or the same price or the same arrangement. [966]

Q. Did you indicate to Mr. Wilcox who those processors were? A. I mentioned Silzle.

Q. What did Mr. Wilcox say to you after you made this request?

A. That Mr. Finley has some surplus fruit and that he would have to talk to Mr. Finley about it; that he has no power to help me on that. Mr. Finley would be the only one who could make some arrangements.

(Testimony of Nicholas J. Winckler.)

Q. What if anything was said by him with reference to his talking to Mr. Finley or you talking to Mr. Finley about the matter?

A. I don't recall exactly whether or not he promised that he will talk to Mr. Finley, or he suggested that I should talk to Mr. Finley, but I know that shortly afterwards I contacted Mr. Finley.

Q. Do you recall about when you contacted Mr. Finley?

A. I believe it was around July 7th, I would say, about three or four days after I talked to Mr. Wilcox, and I tried to make an appointment with Mr. Finley, but he was very busy and he couldn't see me, and he asked me to call him next week.

Q. You mean the following week?

A. The following week.

Q. Did you reach him on the telephone at that time? [967]

A. I reached him on the telephone, but I did not succeed for at least a week to get any definite personal appointment with him.

Q. When you called him on the phone, what did you say to him? Did you call for an appointment or did you discuss it?

A. I called for an appointment and he asked what it is all about, so I told him that we would like to get fruit under the same terms that our competitors are getting, and I understand that he is the only one who can help me; that Mr. Kelly has only the regular $40 fruit. And he said, well, he doesn't know if he can do anything but I should call him next week.

(Testimony of Nicholas J. Winckler.)

When I called him next week, again, and I didn't get any satisfaction——

Q. About when was that call made with reference to the time in July?

A. I would say about a week later. It would be around the 15th of July or near about.

Q. What conversation did you have with Mr. Finley, if any, at that time?

A. Well, I don't recall the exact words, but the result was that I was just put off again.

Q. What did Mr. Finley tell you, Mr. Winckler, at that time? A. Well, he told me—— [968]

Q. This was a telephone conversation?

A. That was a telephone conversation.

Q. All right. Go on.

A. He said that he doesn't have any fruit available and he can't help me. [969]

* * *

Mr. Dixon: Plaintiff's Exhibit 45 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 45 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention, Mr. Winckler, to Plaintiff's Exhibit 45, will you state to the jury what that is?

A. This is a letter written by our corporation to Mr. Finley of the Exchange Orange Products Company, on July 16, 1951.

Q. Now, was that letter written, to the best of

(Testimony of Nicholas J. Winckler.)

your recollection, after this conversation with Mr. Finley that you have just related?

A. Definitely so.

Q. Had you had any further conversations with him other than the one that you have just related before you wrote that letter?

A. Not before I wrote the letter.

(Mr. Dixon passing exhibit to jury.) [970]

Q. Now, will you state in substance, although the letter is in evidence—well, just withdraw that.

Did you ever receive any reply to your letter in writing? A. No, I did not.

Q. From Mr. Finley?

A. No, we have not.

Q. No reply was ever received by Winckler & Smith, then, to Plaintiff's Exhibit 45 insofar as any written reply is concerned?

A. Not to my knowledge.

Q. Did you have any further conversations after you wrote that letter, Plaintiff's Exhibit 45, with Mr. Finley? A. Yes, I did.

Q. Can you state to the jury about when those conversations occurred and where they occurred?

A. Well, I cannot state the exact date, of course, but I called periodically Mr. Finley, first urging an answer to my letter, and also repeating the request for fruit, so that we can get started on single-strength Valencia orange juice.

(Testimony of Nicholas J. Winckler.)

Q. Will you state to the jury about when those calls were made to Mr. Finley?

A. Probably I let a week go by from the date I wrote the letter, and then I called Mr. Finley.

Q. Did you reach Mr. Finley on the telephone at that time? [971]

A. Yes. Sometimes I had to call again, but the most time I did reach him.

Q. When you next reached Mr. Finley after sending this letter to Exchange Orange, Plaintiff's Exhibit 45, what conversation did you have with Mr. Finley?

A. The conversation was in substance the same as before.

Q. Was this conversation on the telephone?

A. It was on the telephone.

Q. Will you state the substance of that conversation to the jury?

A. Well, I was begging for fruit so that we can pack some Valencia orange juice, and I explained to Mr. Finley that it is impossible to pack Valencia orange juice from $40 fruit, taking into consideration the going price of the canned juices, and Mr. Finley agreed with me. He said, "Well, everybody can figure that out."

And then I asked why we couldn't have fruit on an arrangement similar to others. [972]

Q. Now, let me interrupt you there, Mr. Winckler. At the time of this conversation did you have any knowledge of the actual arrangement that might

(Testimony of Nicholas J. Winckler.)

have been entered into between Exchange Orange and either TreeSweet or Silzle at that time?

A. At that time I had no actual knowledge. The only thing that I knew, I knew these people, I knew the competitors, that they would not sell orange juice for $2.20 if they would lose money on each case that they sell. So I knew that they must have some supply of fruit other than $40 fruit, but I had no evidence what the arrangement is, or for what price they get the fruit.

Q. At the time of these conversations with Mr. Finley in July, did you—withdraw that.

I am not certain that I have asked this question, Mr. Finley: Will you state to the jury what the operating capacity in tonnage for processing oranges, Valencia oranges, into single-strength juice, was of the Winckler & Smith plant?

A. Yes. We would run up to 130 tons of Valencia in an eight-hour shift, or close to 400 tons on three shifts. We have done so years before.

Q. Can you state to the jury what the plant capacity, running on an average season basis—by that I mean depending upon the possible interruption of regular flow of fruit [973] to your plant, that is the plant of Winckler & Smith—would be during a processing season for Valencia oranges?

A. I would say that during the Valencia season, in order to operate efficiently our plant should run at least 250 tons a day, which would be about two shifts.

Q. How many days a week would you run on a

(Testimony of Nicholas J. Winckler.)

two a day shift during the processing season? In other words, can you state to the jury what the approximate amount of tonnage is that the plant of Winckler & Smith could process without placing any stress upon the plant machinery during a processing season?

A. Figuring 100 running days and 250 tons a day, which would be only two shifts, without any stress the plant could run easily 25,000 tons of Valencia oranges.

Q. Directing your attention to the fact that Winckler & Smith also processed other products, does that take into account the fact that Winckler & Smith might be processing at the same time during the season grapefruit or some lemons?

A. Usually during the Valencia season most plants, even plants that process different products, are engaged usually in processing Valencia juice, and the other products like grapefruit and lemon products and beverage bases and so on, they are usually processed in what we call during the off season or between the seasons. But it is safe to deduct from these running times or tonnages, say 20 per cent, allowing for [974] some other products to be manufactured during the Valencia season, which is usually not customary.

Q. Will you state to the jury, if you can, the approximate total amount of tonnage, the highest amount of tonnage of Valencia oranges that the Winckler & Smith plant had processed into single-strength juice in any previous year to 1951?

(Testimony of Nicholas J. Winckler.)

A. My recollection is that the highest tonnage that we processed was in 1946, and in 1946 it was between 18,000 to 20,000 tons.

Q. Now, did you have any further conversations with Mr. Finley during the month of August or September of 1951? A. Yes, I did.

Q. And were those telephone conversations or conversations with him in his office?

A. To my best recollection, I had one personal conversation with him at his plant.

Q. And when did that occur, about when did it occur?

A. I would say probably around August 1st.

Q. Who was present at that time?

A. Mr. Finley and myself.

Q. Was there anyone else present to the best of your recollection?

A. No. His secretary was in the next room.

Q. What did you say to him and what did he say to you [975] in substance at that time?

A. Well, I again asked for fruit at a price which would permit us to pack Valencia orange juice, and Mr. Finley said he couldn't do anything.

And when I pointed out to the fact that I know that he is supplying liberally Silzle and TreeSweet with fruit and their plant is running in full swing, he said something to the extent that he is sorry that he did.

Q. Did you have any further conversations with Mr. Finley at all during the processing season in 1951 after this conversation you have just related?

(Testimony of Nicholas J. Winckler.)

A. Yes, I had more conversations which related to single-strength juice pack, and then later on I was trying to get some fruit for the school lunch program, that is for concentrate, and I was turned down on the school lunch program, also.

Q. I believe we have already gone into the school lunch program? A. Yes.

Q. But will you briefly state to the jury again just what that relates to, Mr. Winckler?

A. Well, the school lunch program is a program which is, I think, almost every year arranged by the Department of Agriculture, and my understanding is that the intent for the school lunch program is to take off the growers' hands some surplus oranges, which are processed in so-called hot [976] pasteurized concentrate, and such hot pasteurized concentrate which is distributed in cans is then shipped to the various schools all over the country, and by adding water to the concentrate, you get a very similar product like canned Valencia orange juice, and this is enjoyed by the children of the various schools as a healthy drink and rich in the supply of Vitamin C.

Q. Now, did Winckler & Smith process any oranges for the school lunch program during 1951?

A. Yes, we did.

The Court: The Department of Agriculture asked for bids?

The Witness: They asked for bids.

The Court: And then made contracts on the basis of the bids?

The Witness: They made contracts on the basis

(Testimony of Nicholas J. Winckler.)

of the lowest bidders, or awarded the contracts.

Q. (By Mr. Dixon): Will you state to the jury if Winckler & Smith processed oranges into pasteurized juice, concentrated juice, rather, for the school lunch program in 1951?

A. In 1951 we succeeded to get a small tonnage from the Independent Fruit Growers Association and we submitted a bid for the school lunch program and we were awarded a contract.

Q. About how many tons were processed by Winckler & Smith into concentrated orange [977] juice?

A. If I recall correctly, I think I testified Thursday that it was in the neighborhood of 2,500 tons. However, in the meantime I checked my records at home and it was only around 1,600 tons.

Q. Were those all the conversations that you had with Mr. Finley during the 1951 processing season?

A. Substantially, yes.

Q. I am not sure I asked this question, Mr. Winckler. It was my recollection Mr. Kelly stated he contacted all of the independent processors in 1951 before any fruit price was established for that season. Was Winckler & Smith contacted by Mr. Kelly before the price was set in 1951, to your knowledge?

A. No, we were not. I think Mr. Kelly testified to that extent.

Q. I believe you have already testified that Winckler & Smith ran no single-strength Valencia orange juice through its plant in 1951, is that cor-

(Testimony of Nicholas J. Winckler.)

rect? A. That is correct. [978]

Q. During the 1951 processing season, Mr. Winckler, did Winckler & Smith process any Valencia oranges into single-strength juice for the Silzle Company? A. Yes, we did.

Q. Will you state to the court and jury when that processing occurred?

A. That processing occurred from time to time. The story behind it is——

Q. Let me ask you, first, did someone from the Silzle Company contact Winckler & Smith to do this processing—— A. That is correct.

Q. ——or how did it develop?

Who contacted them?

A. The sales manager from the Silzle Corporation, a certain Mr. Wurgaft.

Q. When did this contact occur? Was it in person or by phone?

A. It usually was by phone.

Q. When did Mr. Wurgaft of Silzle contact Winckler & Smith for any processing during the 1951 season, the first time?

A. Usually two days before he wanted that we should run some merchandise for him.

Q. No. I am asking, Mr. Winckler, the approximate time, if you can recall, that Winckler & Smith was first contacted. [979]

A. We ran for Silzle in July and in August and in September. It was not a continuous run. We run one day, and then we didn't run anything for a month, probably, and then a month later he needed

(Testimony of Nicholas J. Winckler.)

some 12 and 5½ ounce pack, he didn't have a 12 and a 5½ ounce line, so he called us, say, on a Monday and said, "Well, could you run Wednesday for us 600 or 800 or a thousand cases," whatever the case may be. I don't remember the exact quantities.

Q. And that was of the 12 ounce size?

A. Only 12 ounce and 5½ ounce.

Q. And 5½ ounce?

A. They didn't have the lines. [980]

* * *

The Court: How many ounces did you say in the No. 2 can?

The Witness: 18 ounces.

The Court: It will be Exhibit 46, the No. 2 can, received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 46.)

The Clerk: The 12 ounce can will be Exhibit 47, your Honor.

The Court: Received in evidence, Exhibit 47.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 47.)

The Clerk: And the 6 ounce can will be Exhibit 48.

The Court: Received in evidence.

(Testimony of Nicholas J. Winckler.)

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 48.)

* * *

Q. (By Mr. Dixon): Now, the juice that was processed for Silzle during 1951 by Winckler & Smith, then, was processed in the 12 ounce size?

A. Yes, and the 5½ ounce size.

Q. And the 5½ ounce size? [982]

A. Correct.

Q. Can you state to the jury the approximate amount of tonnage of Valencia oranges that were processed by Winckler & Smith during 1951 into the sizes of cans that you have just mentioned?

A. I wouldn't be able to state the exact tonnage. However, it was a very small tonnage, because the 12 and the 5½ ounce size are not big sellers.

Q. They are used primarily for the restaurant——

Mr. Strachan: I move to strike the answer following, "I cannot state," may it please the court.

The Court: It may go out. The jury is instructed to disregard it. [983]

Q. (By Mr. Dixon): Can you state the approximate tonnage, Mr. Winckler?

A. I believe it was less than five or six hundred tons.

Q. From whom, if you know, was this tonnage received, that is to say, did you know the source of the oranges received by Winckler & Smith for this

(Testimony of Nicholas J. Winckler.)

processing? A. Yes, I do.

Q. How do you know the source, Mr. Winckler?

A. Because I know that Silzle received practically all its oranges from Sunkist or Exchange Orange Products, whatever the case may be, and besides the general knowledge, on the fruit delivery tickets, the name of the packing house is always stated.

Q. And what did that indicate to you, if anything, at the time? A. Well, it indicated——

Mr. Strachan: I just want to note an objection of immateriality, your Honor.

The Court: Well, when you note an objection, is that the same as making an objection?

Mr. Strachan: I make the objection, yes sir.

The Court: Sustained as to what it indicated to you. Did you see the tickets?

The Witness: Yes, I did. [984]

The Court: What names were on the tickets?

The Witness: Well, I don't recall the exact name of the packing houses, but they were all Sunkist packing houses.

The Court: All right.

Mr. Strachan: I will move to strike the answer on the ground it is immaterial.

The Court: Overruled.

Q. (By Mr. Dixon): Now, directing your attention, Mr. Winckler, to Ralphs Grocery, I believe it is. Will you state to the jury what that company is, if you know?

A. The Ralphs Grocery Company is one of the

(Testimony of Nicholas J. Winckler.)

leading chain stores or super markets in the Los Angeles area.

Q. Had Winckler & Smith been selling any single-strength Valencia juice to Ralphs in 1950?

A. Yes. We enjoyed a very satisfactory business connection with Ralphs since 1945, every year.

Q. I believe you testified Winckler & Smith processed no single-strength juice in 1951. Did you continue to supply Ralphs with any single-strength juice in 1951?

A. We were able to supply Ralphs with a little single-strength juice packed in Florida, but we were not able to supply Ralphs with California pack Valencia juice.

Q. You mean that the single-strength Valencia orange juice which you sold to Ralphs in 1951 was shipped in from Florida under your Florida operations? [985]

A. Some of it. Not all.

Q. Did you furnish or sell any California Valencia orange juice to Ralphs in 1951?

A. Yes, we did.

Q. Will you state to the jury the circumstances under which that sale or those sales were made?

A. Mr. Hildebrandt, who was secretary-treasurer of the Ralphs stores for many years—he passed away a few years ago—did the purchasing of all the citrus juices, and he called me up one day personally and told me, "Winckler, if you are not able to supply us with California Valencia orange juice,

(Testimony of Nicholas J. Winckler.)

we are going to kick out the Ana-Gold brand for good."

So I complained to him that we are unable to obtain fruit this year for some unknown reason, but I will do my best to try to buy some Valencia orange juice from some other California packers and then label it with our Ana-Gold brand, and ship him at least one or two carloads.

So I made the rounds and I tried to buy at the going price Valencia orange juice from TreeSweet, from Silzle, and I was not successful.

So then I called up the products department of Sunkist in Ontario.

Q. Did you make this call, or was it made by you personally? [986]

A. No. Our assistant sales manager, a certain Mr. O'Hanlon, made the call, and he was instructed——

Mr. Strachan: I think I will have to object to this evidence as to what O'Hanlon said unless a foundation is laid for this witness testifying.

The Court: The objection is sustained.

Q. (By Mr. Dixon): Was this conversation had in your presence by Mr. O'Hanlon with someone at Exchange Orange?

A. Yes. Mr. O'Hanlon talked in my presence.

Q. And what, if anything, was said by Mr. O'Hanlon to anyone at the Exchange Orange?

A. He just simply stated——

Mr. Strachan: I think we should identify what,

(Testimony of Nicholas J. Winckler.)

if anything, the witness knows about the person with whom O'Hanlon talked.

The Court: Yes. Did you hear him put the call in?

The Witness: Yes, I did.

The Court: For whom did he ask?

The Witness: He talked to a certain Mr. Marshall.

Q. (By Mr. Dixon): All right. You may relate the conversation which occurred in your presence with Mr. O'Hanlon and Mr. Marshall.

A. The conversation was very brief. Mr. O'Hanlon stated that we are unable to pack Valencia juice this year and for some customers we need juice urgently, and if he could sell [987] us at the regular going price a few carloads of Valencia orange juice. That is what I heard.

The Court: That is all you can testify to.

Q. (By Mr. Dixon): That's all you can testify to, then, Mr. Winckler?

A. I can testify to the result.

Q. No, not yet.

The Court: When you say you wanted carloads of orange juice, you mean in cans, brights?

The Witness: In cans, brights, unlabeled.

The Court: Unlabeled, so that you could label it?

The Witness: Correct.

The Court: In other words, orange juice isn't sold in tank cars, or anything like that?

The Witness: No.

(Testimony of Nicholas J. Winckler.)

The Court: When you talk about a carload of juice, you are talking about juice in cans?

The Witness: In cans, correct.

The Court: All right. [988]

Mr. Strachan: May it please the court, I wonder if I can note an objection to all testimony relating to this particular transaction on the ground that insofar as the complaint is based on it the allegation was made after the expiration of the statute of limitations. I would like to have that be a standing objection, if your Honor please, to this whole transaction.

The Court: I think that is proper, but this is one of those items that has been discussed before, has it not?

Mr. Strachan: That is right. I don't want to discuss it; I just want to have an understanding that we could have a standing objection.

The Court: I have to anticipate what this is. I don't know yet.

The Clerk: I have marked a group of documents Plaintiff's Exhibit 49 for identification.

(The documents referred to were marked Plaintiff's Exhibit No. 49 for identification.)

The Court: My ruling is the same. There were general allegations in the first complaint, and the amended complaint is more particular. The objection will be overruled, but you may have a continuing objection for the purpose of the record to the

(Testimony of Nicholas J. Winckler.)

entire line of questioning concerning this carload or carloads of juice.

Mr. Strachan: Without stating the objection again? [989]

The Court: Without stating it, yes.

Mr. Strachan: Thank you, sir.

Mr. Dixon: Plaintiff's Exhibit 49 offered in evidence.

The Court: Exhibit 49 received in evidence.

* * *

Q. (By Mr. Dixon): I will hand you Plaintiff's Exhibit 49, Mr. Winckler, and ask you to examine the same and state to the jury, if you will, what those various documents in Exhibit 49 are.

A. Here is an invoice from Sunkist, which was received by our corporation on October 4, 1951. It relates to a thousand——

* * *

The Court: Tell us generally what this whole exhibit [990] refers to, first, and then go ahead.

The Witness: It refers to 1,400 cases of single-strength unsweetened Valencia orange juice, unlabeled, which we purchased from Sunkist for——

Mr. Dixon: By "we" you mean who?

The Witness: Our corporation, Winckler & Smith Citrus Products Company, purchased for a total amount of $3,300.34.

Q. (By Mr. Dixon): Is this the orange juice that you just referred to in the conversation that was had with Exchange Orange by Mr. O'Hanlon?

(Testimony of Nicholas J. Winckler.)

A. That's it.

The Court: How much of a carload is 1,400 cases?

The Witness: 1,400 cases is a small carload.

The Court: Ladies and gentlemen, this document is received in evidence generally. It is also one of the matters of which plaintiff makes particular complaint as to damage. The particular matters that plaintiff claims caused damages were the TreeSweet and Silzle contracts, not the other contracts which we received in evidence generally, the General Foods and so forth, and this particular transaction.

I call that to your attention because of the fact that I have been indicating that certain evidence was received for general purposes and not in connection with items which plaintiff claims caused them damage.

Nothing I say indicates any view that I may have as to [991] the facts in this matter. The jury are the sole judges of the facts in this case.

I think I should add that the claim of plaintiff in connection with this transaction is under the theory of price discrimination.

Is that correct?

Mr. Dixon: Yes, your Honor.

The Court: Which is different from plaintiff's contention as to the other contracts.

Well, that isn't a correct statement, either.

Do you contend that the Silzle and TreeSweet contracts are claims under the Robinson-Patman Act?

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: The contention of the plaintiff with respect to this transaction, your Honor, relates to the fact that under the TreeSweet contract, TreeSweet was acquiring the same product, namely, single-strength Valencia orange juice, at a price substantially different from and below that at which the plaintiff purchased the same product, namely, Valencia single-strength orange juice.

The Court: All right. [992]

Mr. Strachan: May it please the court, I think it is objectionable at this stage of the trial to discuss legal theories and legal contentions, and I should like to have the jury instructed to disregard this discussion of contentions and theories on which it is offered, because those are matters in which the jury should be governed by instructions that your Honor will give at the conclusion of the evidence.

The Court: Whether this is done artfully or not, I am not prepared to state.

Mr. Strachan: I didn't understand.

The Court: Whether what I have said has been done artfully or correctly, I am not prepared to say. I say artfully. In the sense that I don't properly state what the contentions of the parties are, I want to be corrected. However, I disagree with you as to whether or not it is proper to advise the jury as to what issues they are trying, and in that sense your objection is overruled.

If we were trying a one-day case, I think probably the issues need not be pointed up to the jury, but I think in a case of this magnitude and complex-

(Testimony of Nicholas J. Winckler.)

ity, and in the character of the different causes of action, in view of the fact that some evidence is received for one purpose and some evidence is received for another purpose, the jury is entitled to know what particular theory or cause of action certain evidence [993] is entered on.

Nothing that I say, and I have told this to the jury time and time again, is to indicate any view I may have. I merely would like to have the jury understand as we go along in the plaintiff's case, and when the defendants' case starts, what your contentions are and what the issues are that they must decide.

So your objection is overruled. I don't think I have stated artfully what should be stated, so I will instruct you to disregard what I said and what Mr. Dixon said.

I will merely at this time say that one of the causes of action, a part of the claim of the plaintiff, involves price discrimination under the Robinson-Patman Act, which is one of the antitrust statutes, and that this contract is offered particularly in connection with that claim of the plaintiff.

Proceed.

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 49, and particularly the invoice from Exchange—— A. From Sunkist.

Q. ——from Sunkist for the orange juice purchased from Sunkist and in the amount specified on said invoice, will you state to the jury, Mr. Winck-

(Testimony of Nicholas J. Winckler.)

ler, whether cash was paid for this purchase to Sunkist?

A. The invoice called for 10 day terms at one and a half per cent cash discount. It was received on October 4th, [994] and the check was made out on October 11th. We took the discount of $49.47.

* * *

Mr. Strachan: As to Exhibit 50, I have only the standing objection, your Honor.

Mr. Dixon: Plaintiff's Exhibit 50 offered in evidence, your Honor.

The Court: On the statute of limitations?

Mr. Strachan: Yes.

The Court: Exhibit 50 received in evidence. The objection is overruled.

* * *

Mr. Dixon: So that the jury may know what Exhibit 50 is, may it be stipulated, counsel, that this exhibit represents a statement of the sales made by Sunkist to TreeSweet under the TreeSweet-Exchange Orange contract, Plaintiff's Exhibit 20, for and during the weeks ending September 27, 1951, October 2, 1951, and October 10, 1951?

Mr. Strachan: I will so stipulate, subject to check.

I think that is correct.

Mr. Dixon: May we exhibit this to the jury, your Honor? [996]

The Court: Yes.

Mr. Dixon: May it be stipulated, counsel, sub-

(Testimony of Nicholas J. Winckler.)

ject to your check as to the figures, that for the purchase of the 1,000 cases of 12/46's and for the purchase of 400 24/2's by the plaintiff from Sunkist, at the prices specified in Plaintiff's Exhibit 49, that for the purchase by TreeSweet of the same amounts and sizes of orange juice there would be a difference of $404.76 in favor of TreeSweet on such purchases?

Mr. Strachan: Subject to check we will so stipulate.

The Court: All right.

Mr. Dixon: If I have an error in figures, you may correct me, but I think that is correct.

Q. (By Mr. Dixon): Now, Mr. Winckler, I believe you previously testified that Winckler & Smith re-acquired the plant at which it conducted its processing operations in Anaheim sometime in 1951; is that correct? A. That is correct.

Q. Will you state to the jury about when that plant was re-acquired and the terms and consideration given by Winckler & Smith for the plant when it was re-acquired in 1951?

A. The plant was re-acquired for a cash consideration of approximately $18,000 and a preferred stock consideration of about $132,000, making the total cash and stock $150,000 even, subject to encumbrances existing against the plant, we still owed to RFC, the Reconstruction Finance Corporation, an [997] amount in excess of $50,000.

Q. That was due for a mortgage which the RFC held on the plant of Winckler & Smith?

A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. You stated that some stock was given by Winckler & Smith in addition to the cash for the plant. Was any of that stock the stock which Winckler & Smith had been authorized to issue by reason of the permit secured from the Division of Corporations of the State of California to issue such stock in 1951? A. That is correct.

Q. That is part of the stock which the Winckler & Smith company was authorized to issue pursuant to the permit which is set forth in Plaintiff's Exhibit 39?

A. That is correct. We had a permit to issue $295,000 worth of preferred shares, and $315,110 worth of common shares. Out of the preferred shares, which had a par value and an offering price of $5, that amounts to 59,000 preferred shares at $5 each.

The Court: What amounts to that?

The Witness: What we gave in consideration—out of these shares we gave in consideration for the plant, approximately $132,000 worth of preferred shares. The balance we had the right to sell to the public.

Q. (By Mr. Dixon): State to the jury, if you will, whether any of those shares were in fact sold to the public. [998]

A. We sold to the public approximately $37,000 worth of preferred shares and then we withdrew from the offering because when we——

Q. Will you state to the jury about when you withdrew the offering of stock to the public?

(Testimony of Nicholas J. Winckler.)

A. We withdrew the offering to the public some time in August, if my recollection is correct.

Q. At that time can you state approximately how many shares Winckler & Smith could—or were still available for sale under this permit to the public, approximately?

A. It will take me just a second to figure that out. Well, we disposed of $132,000 worth of preferred shares in exchange for the plant. We sold 37,000 and a few shares to the public——

The Court: Dollars, you mean?

The Witness: Dollars worth of shares, so that the total disposed of was $170,000. We still had the right to offer to the public $125,000 worth of preferred shares.

Q. (By Mr. Dixon): You stated that you withdrew the offer to the public some time in August, is that correct? A. That is correct.

Q. Will you state the reason to the jury why you did not proceed with the sale of the stock?

A. When we found ourselves without adequate supply of fruit and we knew that we wouldn't be able to can any single-strength [989] Valencia juice, which was always the most important item, and we realized that we are going to lose some money, under such circumstances we decided it wouldn't be fair to keep on offering stock to the public when we had a condition of a bad year.

Q. Now, directing your attention to the RFC mortgage, which I believe you stated the Winckler & Smith company had on its plant after it was re-

(Testimony of Nicholas J. Winckler.)

acquired, will you state to the jury whether the Winckler & Smith company made the payment of the principal amount of $50,000 approximately due on said mortgage in 1951?

A. At the maturity—I don't follow the question.

Q. Withdraw the question. Was the RFC mortgage on the Winckler & Smith company plant in default as to the entire amount due the RFC at any time in 1951? A. Yes, it was. [1000]

Q. Will you state to the jury when that default occurred?

A. That default occurred, to my best recollection, late in the fall. It was probably September or October.

Q. Was that the time at which the entire amount of the principal of the loan was called by the RFC?

A. According to the original terms the loan matured on February 1, 1952, but due to the default which occurred in the monthly payments the RFC had the right——

Q. You mean the monthly payments that were in default in 1951?

A. Yes, sir, September and October, 1951, the RFC had the right to accelerate the maturity date, and make the whole loan due and payable prior to its original maturity date.

Q. And was that done by the RFC, to your knowledge, in 1951?

A. As I said, I recall that in September or October, 1951, we received a notice from the Reconstruction Finance Corporation in which they de-

(Testimony of Nicholas J. Winckler.)

clared the whole loan due and payable and stated that they are to start foreclosing procedures unless we make the payments good.

Q. What if anything did Winckler & Smith do about the RFC mortgage and the default thereon, Mr. Winckler?

A. Well, we did everything possible to refinance the loan. First we went to the RFC and we tried to get a new loan [1001] from the RFC to refinance the $50,000 for five years. The RFC told us that we don't owe enough money, they don't do so, because they feel they are well secured, so there is no reason that they should refinanec the loan.

Then I went to the Bank of America. The Bank of America gave us the answer that it is customary that the RFC is bailing out some frozen loans, but the Bank of America won't bail out the RFC. So we were turned down, in spite of the fact that the bank agreed that there is a very substantial collateral for a $50,000 loan, but they had no confidence in our ability, due to the fact that we couldn't produce Valencia orange juice in 1951, they had no confidence in our ability to operate a profitable business from there on.

Q. What happened after that, Mr. Winckler?

A. Well, I tried——

Q. With reference to the RFC obligation.

A. The RFC foreclosed, and then the RFC arranged for a public sale as a result of the foreclosure proceedings.

Q. At what time did the Winckler & Smith Com-

(Testimony of Nicholas J. Winckler.)

pany file proceedings under Chapter 10 of the Bankruptcy Act?

A. We filed proceedings under Chapter 10 just about two days before the sale was scheduled by the RFC, in order to protect our assets for the benefit of our creditors and shareholders.

The Court: When was that? [1002]

The Witness: It was the latter part of February, your Honor. I think the 27th or 26th of February.

The Court: 1952?

The Witness: 1952.

The Court: Is counsel interested in having explained generally what a Chapter 10 proceedings is?

Mr. Dixon: I would, your Honor. I think the jury is probably very much in the dark as to what that is, and I was endeavoring to find some way to ask this witness to try and explain it.

The Court: Is there any objection?

Mr. Strachan: No. I think it would be clarifying.

The Court: We have, first, the general bankruptcy law whereby an individual or a corporation may either go into bankruptcy voluntarily, where they petition to be declared a bankrupt, or where their creditors throw them into bankruptcy, as we say, by petitioning. But Congress later passed some other laws, and we speak of them, as lawyers, as Chapter 10 and Chapter 11 proceedings. There may be other chapters in there, but I am not too familiar. At any rate, they are proceedings whereby a person or a corporation may petition the bankruptcy court

(Testimony of Nicholas J. Winckler.)

to make an arrangement with its creditors in an attempt to preserve a business without the events following what normally follow in a bankruptcy.

There are some technical differences between Chapter [1003] 10 and Chapter 11. I think Chapter 10 involves a corporation where there is some impact upon shareholders, that is, the debtor may propose a plan whereby shareholders will have to scale down their rights, or bondholders will have to scale down their rights, and creditors scale down their rights, and then see if they can work something out to save the corporation.

Chapter 11, I think, doesn't involve bondholders or shareholders.

Is that generally correct between those two chapters?

Mr. Fisher: I think it is. In Chapter 11 proceedings, as I understand it, they cannot affect secured obligations, but in Chapter 10 proceedings they may be affected.

The Court: For our purposes we are not particularly concerned, except that is what we mean by Chapter 10 and Chapter 11.

This was under Chapter 10. The general purpose of Congress was that a corporation under Chapter 10 or Chapter 11 could then come in and see what could be worked out.

Then there have been cases in the bankruptcy court where corporations pulled out, paid all their obligations, made some plan of arrangement. There have been other cases where corporations failed to

(Testimony of Nicholas J. Winckler.)

work out some plan and then they were adjudicated a bankrupt, and all the things that follow upon a bankruptcy. [1004]

So this Chapter 10 proceedings was an application to the bankruptcy court not to be adjudicated a bankrupt, but to see if a plan could be worked out, and in the event of working out the plan, then bankruptcy wouldn't follow.

Is that enough?

Mr. Fisher: Your Honor, I might say that the Chapter 10 proceedings were filed March 20th.

The Court: March 20th instead of February. March 20, 1952. [1005]

Q. (By Mr. Dixon): I believe you testified, Mr. Winckler, that Winckler & Smith had a net profit after all operating costs, expenses, during the years 1949 and 1950, is that correct?

A. That is correct.

Q. Will you state to the jury whether Winckler & Smith had any operating profit in 1951?

A. No. Winckler & Smith lost money in 1951.

Q. Can you state to the jury the approximate amount of that loss?

A. Approximately $184,000.

* * *

Mr. Strachan: I can state it very briefly, your Honor. I don't think the subject is one proper for opinion evidence, and I think it calls for the witness' subjective conclusion from, perhaps, matters beyond the evidence. It would be [1006] argumen-

(Testimony of Nicholas J. Winckler.)

tative rather than evidentiary, and would also tend to invade the province of the jury.

The Court: The last one, I think is good. There may be others. I will sustain the objection.

Q. (By Mr. Dixon): Mr. Winckler, I am now going to ask you, as operating head of Winckler & Smith during the period of time that you have testified that you were president of Winckler & Smith, whether, if you had had access to Valencia oranges for processing purposes under an arrangement comparable to that expressed in the TreeSweet contract—— A. We did not.

Q. Just a minute. I am not finished yet—and assuming normal operations during the year in question, processing operations, under such a contract could the plant of Winckler & Smith operate at a profit during the year 1951 under such an arrangement, assuming it to have been available?

A. Very definitely so.

Mr. Strachan: Excuse me. I have the same objections to this question as I had to the last.

Mr. Dixon: It is very material.

The Court: This is a different question. The latter part of your objection on invading the province of the jury does not apply to this question as it did to the other. The question uses the word normal operations, but we have evidence in the record from this very witness as to what he meant by [1007] normal operations. I don't think the question is objectionable. The objection is overruled. The answer may stand.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Dixon): Do you want the question re-read, Mr. Winckler? A. No. I remember it.

Q. Now, answer the question.

The Court: He already answered. Did the jury hear the answer? The jury indicates they heard the answer.

Q. (By Mr. Dixon): Mr. Winckler, I believe you stated that Winckler & Smith sold its product under the name Ana-Gold, is that correct?

A. That is correct.

Q. How long did Winckler & Smith have that label or brand?

A. From 1945 on since we started to operate first.

Q. Is that what we call a copyrighted brand?

A. It is a registered trade-mark.

Q. Registered trade-mark? A. It is.

Q. What amounts, approximately, if you know, were spent by Winckler & Smith in developing the brand name Ana-Gold by advertising it?

A. Well, I cannot name the exact amount, but it would be several hundred thousand dollars in merchandising and direct advertising over the period of years from 1945 on. [1008] I might mention that we had ads running in New York papers where one ad cost as much as $6,000.

Q. Was any appraisal made, to your knowledge, of the value of the Winckler & Smith plant?

A. Yes. There were several appraisals made. The first appraisal was made, if I recall correctly, in 1946. Then the plant was reappraised, I think, in

(Testimony of Nicholas J. Winckler.)

1950. And then when additional equipment was acquired, there was an amendment made to such appraisal, and regular depreciations and appreciations were taken as the prices of machinery, equipment, real estate and improvement increased or depreciated.

Q. Can you state to the jury, if you know, what the value of the plant and equipment of Winckler & Smith company was approximately in 1951?

A. Yes, I recall very correctly. The appraised sound value, including land, the five buildings, machinery and equipment, the sound value was in excess of $730,000, and the replacement value was somewhere, I think, around $850,000 or $860,000.

* * *

Q. Before we adjourned, Mr. Winckler, I believe you testified to the valuation of the land and equipment of the Winckler & Smith Company as being in excess of $700,000, is that correct?

A. Correct.

Q. Will you state to the jury the basis of your estimate of such valuation?

A. I mentioned that we had several appraisals made in 1946, 1950 and 1951, which were made by the Union Appraisal Company of Los Angeles.

(The following proceedings were had at the bench outside [1012-13] the hearing of the jury.)

Mr. Strachan: May it please the court, I think I

(Testimony of Nicholas J. Winckler.)

am going to have to ask that somebody who will take personal responsibility for the accuracy of the contents of this be brought in to identify it and testify it is a sound appraisal. Otherwise, I have no way of cross-examining on the contents.

The Clerk: There is no continuity in the record. Nothing has been said about this document yet.

The Court: Well, they are talking about a written appraisal or report about which there has been no testimony.

Mr. Strachan: I have no objection to his reopening his case at a later time and calling another witness to put the appraisal report in. It seems to me it is the work of a third person and Winckler's identification couldn't in any way support the contents.

The Court: He is right, as a matter of law.

Mr. Dixon: The question of this witness was the basis of his appraisal of the value of the property, to show that it is based upon this appraisal. That was the sole purpose of offering it.

Mr. Strachan: He has already said it was appraised.

The Court: You can mark it for identification and if anything else has to be done with it, you can do it, but the objection will be good if made.

Mr. Strachan: If all you want to do is just have it [1014] identified as the appraisal that he received and have it marked and not offer it, all right.

Mr. Dixon: On which he based his opinion, and

(Testimony of Nicholas J. Winckler.)

then just have it marked for identification. It wouldn't go in then.

The Court: That's right.

Mr. Dixon: Until someone else can identify it.

The Court: It would be to show that he was telling the truth when he said he had a report of some kind.

(The following proceedings were had in the hearing and presence of the jury.)

The Clerk: I have marked a document which we have been talking about, your Honor, as Plaintiff's Exhibit 51 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 51 for identification.)

The Court: All right.

Q. (By Mr. Dixon): I hand you what has been marked for identification as Plaintiff's Exhibit 51 and ask you if that is the appraisal that you refer to in your testimony? A. Yes, it is.

The Court: It is marked and not offered, as I understand.

Mr. Dixon: That is correct, your Honor.

The Court: All right.

Mr. Dixon: That's all. [1015]

The Court: You may cross-examine.

(Testimony of Nicholas J. Winckler.)

Cross-Examination

By Mr. Strachan:

Q. Mr. Winckler, at this morning's session you mentioned having sought to refinance either the business or the mortgage, the RFC mortgage, through the Bank of America. Can you tell us when and where you had a conference with any officer of the Bank of America?

A. Yes. It was the Anaheim Branch of the Bank of America and it was during the late part of 1951.

Q. Can you identify the employee or officer of the bank with whom you talked?

A. Yes, I can. His name is Mr. Hanson, manager of the Anaheim branch.

Q. Did you have only one conference with him?

A. I think I had two.

Q. At or about the same time?

A. Very close. The same week.

Q. Had you ever sought credit from the Bank of America prior to that? A. Yes. We——

Mr. Dixon: If the court please, I assume counsel's question is directed to Winckler & Smith, in all of these questions.

Mr. Strachan: Yes. [1016]

The Court: We will have it understood where either side uses the word "you" to this witness, they are referring to the corporate entity, Winckler & Smith.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Unless it appears that the person is definitely involved.

The Court: Unless the contrary appears.

Mr. Strachan: Yes.

The Witness: Yes. We had credits from the Bank of America in excess of $1,000,000 during 1949 and 1950 for regular operating purposes.

Q. (By Mr. Strachan): Unsecured loans or secured loans? A. They were unsecured loans.

Q. Was that through the Anaheim branch?

A. They were through the Anaheim branch. If necessary, I have a letter here from the bank which, if counsel wants to introduce it into evidence, it is available.

The Court: Well, don't tell the attorneys how to run their case now. You let them decide.

Mr. Strachan: I will be very glad to look at it during the recess.

Q. (By Mr. Strachan): Now, in this morning's testimony you also said that you had processed what you said was a small tonnage of Valencias into single-strength juice for Silzle and that that juice was packed in 5½ and 12-ounce or No. 2 cans. [1017]

A. 12 ounce, not No. 2.

Q. 12 ounce, or 5½? A. 12 ounce and 5½.

Q. Did you pack yourself or for anyone else any Valencia single-strength juice in the 1951 season for other than Silzle?

A. No, I don't recall a single case that we packed in 1951 except for Silzle.

Q. Did you during that 1951 season pack any

(Testimony of Nicholas J. Winckler.)

single-strength juice in any sizes other than 5½ and 12 ounce containers?

A. I assume the question is directed only to Valencia juice and not blend?

Q. That is correct.

A. I have no recollection except probably three or four cases for sample purposes or so on.

Q. In what sizes might they have been packed?

A. Samples are usually packed in a No. 2 container.

The Court: How many ounces to a No. 2?

The Witness: 18 ounces.

Q. (By Mr. Strachan): In discussing the capacity of the plant and the extent to which you had utilized plant capacity in prior use, I believe you said that the total plant capacity during the Valencia season would theoretically be as high as 25,000 tons of oranges, but that to be conservative and allow [1018] for times when the fruit might not be available, or for other reasons might not operate, that you regarded 20,000 as the practicable capacity, is that correct, 20,000 tons?

A. I have to qualify that. I said to be conservative I like to set aside 20 per cent of our theoretical capacity to use certain days to plan to manufacture other products, but single single-strength Valencia juice.

Q. Do you recall your testimony this morning that in the year of greatest Valencia orange juice production, you had used the plant to process approximately 20,000 tons of Valencia oranges?

(Testimony of Nicholas J. Winckler.)

A. Well——

Q. That was the year 1946, I think you said.

A. In 1946 is correct. Now, the 20,000 tons may include some grapefruit, but the majority of this tonnage at my best recollection was Valencia. [1019]

Q. Have you any way of estimating what your production of Valencia was in the 1946 season, which was the peak season of your production?

A. Well, that was nine years ago. It would be a wild guess on my part to estimate.

Q. I don't want any wild guesses, Mr. Winckler. The books and records of Winckler & Smith Company are available, are they not?

A. Yes, they are.

Q. Have you consulted those records to see what quantities of Valencias you processed in that peak year of 1946?

A. No, I have not consulted these records.

Q. Don't you know, as a matter of fact, that those books and records show that in that peak year of 1946 you processed only 13,874 tons?

The Court: Of Valencias?

Q. (By Mr. Strachan): Of Valencias.

A. And how much grapefruit?

Q. I am not talking about the grapefruit. We didn't analyze grapefruit. We were talking about the Valencia capacity, which was what you were talking about this morning. Have you consulted the books or can you consult them to verify that figure?

A. I can consult the books. I think these figures could be verified. [1020]

(Testimony of Nicholas J. Winckler.)

Q. From the books of the company?

A. However, when we talk about citrus tonnage——

Mr. Strachan: Will the Judge admonish the witness to answer questions and not give a dissertation?

The Court: I am going to watch that. But this time I want to find out what he is going to say. I may strike it out.

Your answers must be responsive to the questions. You are being examined now by the opposite side. They have a right to cut you off from long speeches.

Now, what were you going to say? We will see if it is material. Something about citrus tonnage.

The Witness: What I tried to say, your Honor, is that the form in which way the question was put is misleading, but we were discussing, if I understood correctly, the capacity and the tonnage that we were running through the plant during the Valencia season.

The Court: Now, just a minute.

The jury will be instructed to disregard the remark. Your counsel will have a chance to ask you questions later on. If you have things you want to bring out, you may make mental notes and call them to his attention.

I said "your counsel"; I mean counsel for the trustee and for the corporation.

Proceed. [1021]

Q. (By Mr. Strachan): It is a fact, isn't it, Mr. Winckler, that as the years went by the proc-

(Testimony of Nicholas J. Winckler.)

essing of Valencias became a lesser and lesser part of the citrus fruit business in California?

A. I cannot answer that question, unless the question specifies which form of Valencias; if we are talking about single-strength juice, hot pasteurized concentrate, frozen concentrate. Valencia is a general statement.

Q. Well, isn't it a fact that in the crop year of 1949 you processed 12,780 tons of Valencias, more or less?

A. That is correct. That figure I remember.

Q. Now, in the following crop year you processed only 8420 tons of Valencias, more or less?

A. That is correct, too.

Q. So that in the crop year of 1950 the Valencias that you processed were, oh, approximately 40 per cent of the plant capacity of 20,000?

A. 1950 was less than 1949.

Q. Well, 8400 is less than 12,780, isn't it?

A. That is correct.

Q. In the crop year of 1951 your tonnage of Valencias processed was 5,050, more or less, wasn't it?

A. Well, again, I have to refer to the fact that unless we are specifying in which product the Valencia orange juice goes, we don't get the picture straight. [1022]

Q. But you did process 5,050 tons?

A. But not single strength.

Q. But you did process that many Valencias, didn't you? A. That is correct.

(Testimony of Nicholas J. Winckler.)

May I have the court's permission to explain here something, in order to reveal the tonnage in the proper light?

The Court: Yes. What is it?

The Witness: I have to take exception to the statement, which was implied with the question, that the Valencia tonnage that we processed decreased from year to year. Because the Valencia crop, and the amount processed, not only by our corporation, but by other California corporations, is subject to two factors. The one is the size of the crop and, second, the salability of the juice. So in one year, let's assume 1950, if less Valencia single-strength was produced in California by the industry, it has no bearing that 1951 wouldn't process probably twice as much as 1950.

The Court: All right.

The Witness: And that is a fact which is known by government reports.

The Court: All right.

When questions are asked you, try first to answer the question. If it requires an explanation, you may give it. But answer the question that is asked of you. [1023]

The Witness: Thank you, your Honor.

Q. (By Mr. Strachan): From 1938 until 1944, when u became interested in this citrus fruit plant Anaheim, you had had little, if any, experience as an American businessman, is that not true?

(Testimony of Nicholas J. Winckler.)

A. Well, I was engaged in real estate, and in other businesses, not food processing.

Q. Weren't you asked at the time your deposition was taken in June of 1952, whether you had had any business experience in the United States before you entered the citrus business, and you said "Very little"?

A. Very little as far as citrus processing business was concerned in the United States.

Q. Well, didn't you also say that in the United States I did very little before I went into the citrus business?

A. Very little what?

Q. The question was, "How about the experience in the United States," and the answer: "In the United States I did very little before I went into the citrus business." Do you recall that?

A. That is correct. [1024]

Q. Mr. Wickler, I show you this Plaintiff's Exhibit 37, which is the aerial photograph you identified on Thursday. A. Correct.

Q. Can you tell us which of those buildings are the Winckler & Smith plant and which are other buildings, and point them out so that the court and jury can see them?

The Court: Well, point them out so the jury can see.

The Witness: Would it be permissible that I draw a frame around the buildings which are ours?

The Court: Well, you do first what counsel told you to, and then you can draw a frame.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I would just as soon withdraw the question, if he can do it that way. I think it might make the exhibit more intelligible.

The Court: First show the jury the picture. Can the jury see this?

Show us first with your pencil which is the Winckler & Smith plant.

The Witness: Here is the railroad. Everything on this side of the railroad is the Winckler & Smith plant.

The Court: Draw your pencil around it.

The Witness: One, two, three, four.

The Court: All right. This is a slick. Has somebody got a pen that flows easily? Here is one. Let's get this marked. [1025]

The Witness: This works pretty good.

The Court: I will run those lines over to the edge a little bit so we can see them.

For the purpose of the record, on Exhibit 37 the Winckler & Smith plant is that part of the picture running diagonally through the center of the picture from the lower left-hand corner toward the upper right-hand corner of the picture.

Mr. Strachan: Very good. May I exhibit this to the jury now?

The Court: Yes, show it to the jury.

(Mr. Strachan handing exhibit to the jury.)

Q. (By Mr. Strachan): Now, I am holding Exhibit 38, which is a collection of Winckler-Smith brand labels. Were these labels the only ones, the

(Testimony of Nicholas J. Winckler.)

only brand labels that were used during the period from 1949 down to the date of the bankruptcy proceedings?

A. These were our most important labels. However, I testified that we packed under private label for other—for buyers like wholesale grocers, and so on.

Q. Those were their labels, not the Winckler-Smith brand labels?

A. The Winckler & Smith had also a second label which was called the Anapride label, which were used on merchandise which we felt is not up to standards of the Anagold brand [1026] name. To compare it, it is just like Sunkist had Sunkist label and the Exchange label.

Q. Will you tell us what products were packed under this second label and identify the respects in which the products packed under that label were regarded as inferior?

A. Well, I wouldn't use the word inferior. I would say not up to the high standards of Anagold.

Q. In what respects, quality respects, did the product packed under the name Anagold differ from that packed under Anapride?

A. For instance, if the Valencia orange juice was not up to full maturity, we preferred to sell it under the Anapride label, or when we packed some California grapefruit, which is not as good grapefruit as the desert grapefruit, we used the Anapride label. In instances where there was a demand for

(Testimony of Nicholas J. Winckler.)

either navel juice or navel blend, we preferred to use the Anapride label.

Q. You say you prefer to use it in these instances, but did you always use it in those instances? A. We did not use it always.

Q. You sometimes used the Anagold label where you would prefer to have used Anapride, is that right?

A. Correct. That was done when the buyer demanded it.

Q. You also mentioned, or your counsel mentioned, that there were some cans on which the label was lithographed? [1027] A. Correct.

Q. Was the Anapride label sometimes lithographed?

A. No. The Anapride label was never lithographed.

Q. What about the Anagold label or brand?

A. On the Anagold brand, we had lithographed cans in 1945 during our first year, when we had trouble obtaining fast enough regular labels. Except for the emergency, we never used on orange juice lithograph labels, but we did use lithograph labels first on all frozen product, which is customary, because in the cold storage the label usually disintegrates.

And then we used lithograph labels on our 12-ounce beverages. One lemonade can was introduced as an exhibit this morning. That is the 12-ounce lithograph beverage can that I am referring to.

The Court: Don't you think we had better tell

(Testimony of Nicholas J. Winckler.)

the jury the difference between labels and lithographing?

Mr. Strachan: I would be very glad to have the witness explain that.

The Court: I take it, Mr. Winckler, that the labels are the paper labels shown in Exhibit 37, which are put around cans, and lithographing is where this printing is put directly on the tin of the can?

The Witness: That is correct. If your Honor so desires, I have some samples of both along [1028] here.

The Court: I think the jurors saw the cans.

Q. (By Mr. Strachan): The Department of Agriculture has set certain standards of quality for various grades which may be sold as U. S. graded, does it not? A. That is correct.

Q. The first or best quality is known as Grade A or fancy? A. Correct.

Q. Grade C or standard is the intermediate grade, is that correct? A. That is correct.

Q. And then Grade D is called substandard?

A. That is correct.

Q. Now, I notice on some of these labels contained in Exhibit 38. for example, the one on top is called Anagold Fancy—does that mean that the container so branded meets the standard specifications of fancy? A. May I see the label, please?

Q. Surely. A. Yes, that is correct.

Q. That means, the fancy there means exactly the same as U. S. Grade A or U. S. fancy?

(Testimony of Nicholas J. Winekler.)

A. Well, if I may; I like to explain something on that.

Q. Surely.

A. While there are established standards on orange [1029] juice like on any other food product, there is a great deal of difference used in grading of oranges which was handled in California compared to Florida. In Florida the canners got together and voluntarily made it compulsory to have the juice packed under Government supervision, and all Florida labels bear the shield of the United States inspector who officially graded it as U. S. fancy and made the statement it was packed under Government supervision.

The California industry did not adopt the same procedure, so that is the one thing I like to point out.

Then the word fancy was always strictly observed with regard to Government orders, deliveries to the quartermaster, for instance. [1030]

Q. They were all packed under government supervision, weren't they?

A. They were all packed under government supervision, but at the same time I would like to make this statement: That some time on orange juice, which under the government standards would not qualify as fancy, would be better than another orange juice that could qualify under the government standards as fancy, because there are too many components that decide what is fancy and what isn't.

(Testimony of Nicholas J. Winckler.)

Q. Coming back to this first label, does "Fancy" on the Anagold label mean that the contents of the can would grade fancy according to the standards of the United States Government?

A. We believe it would, in spite of the fact that it was never examined by a government inspector.

Q. You had your own inspection service, did you not?

A. We had our regular plant inspection.

Q. With laboratory analysis and such like that?

A. Yes, that is correct.

Q. Based on that you want the jury to understand that "Fancy" on an Anagold package means that it would meet the specifications and requirements of the Government Grade A of fancy quality? A. Correct.

Q. Here is another Anagold label. Instead of saying [1031] "Fancy" it says "Fancy California." Would the use of "California" in any way indicate a difference in quality between that product and the one that is marked "Fancy"?

A. No, it would not.

Q. So you would say that the California Fancy——

A. The word "California" is just added simply to identify it that it is packed in California and not in Florida. It would have no bearing on the word "Fancy."

Q. You want the jury to understand that the California Fancy Anagold would meet the specifications of Grade A Fancy as defined by the De-

(Testimony of Nicholas J. Winckler.)

partment of Agriculture? A. Correct.

Q. Here is a specimen of the labeling of the Florida juice which has the U. S. Grade A Fancy and the government shield imprinted.

A. Correct. That is what I was referring to.

Q. That is what you just explained?

A. Correct.

Q. I believe under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit, is that correct?

A. That is correct.

Q. Sweetened orange juice contains no ingredient other than the juice with dry sugar added, is that correct? [1032] A. That is correct.

Q. Those same restrictions apply to grapefruit juice and to blends, is that right?

A. That is correct.

Q. I would like to have you describe processing, we will say, of Valencia oranges in the Winckler & Smith plant. Will you tell us, first, how the raw fruit is received at the plant?

A. Raw fruit is received at the plant by trucks. From the trucks the fruit is put in the receiving bins. From the receiving——

Q. How is it put in the receiving bins? Is it tumbled in or poured in, or what?

A. All orange trucks have little doors or steel gates, which are pulled up, and the oranges flow out from the truck and are received in the receiving bin, which is about, more or less, the same

(Testimony of Nicholas J. Winckler.)

height as the little doors which are on the bottom of the truck. From these receiving bins, again by these little gates, they are conveyed on a rubber conveyor belt. The rubber conveyor belt then usually takes it to a so-called fruit lift or fruit elevator, which carries the oranges either in the storage bins—the storage bins are either of steel or of wooden construction with proper air space, so that they can ventilate properly—or the oranges are conveyed, again, by automatic rubber conveyors into the [1033] plant. After they are received in the plant from the rubber conveyor the oranges go through a washing process. First they go to a washing tank, which contains heated water, either with the addition of soap, or without the addition of soap, depending how clean or dirty the oranges are. The water is heated. After proper agitation in the tank it goes to a fruit washer.

Q. Is that sometimes called a scrubber?

A. You can call it a scrubber, because it contains 13 or 15 or 17, depending on the size, long brushes, which are rotating, and the oranges are scrubbed on top of these rotating brushes under a water spray. Then the oranges are automatically conveyed by lifters from brush No. 1 to brush No. 2, then to brushes No. 3, 4, 5, 11, and so on. The oranges are completely washed as clean as humanly possible. From there a fruit lift takes it——

Q. Just before you go to that, if there is fruit from the scrubber that has soft or rotten spots, what happens to it in the scrubbing process?

(Testimony of Nicholas J. Winckler.)

A. That is a good question, because I missed one operation.

We have, like other citrus packers, fruit pickers, the way we call it, or fruit sorters. Before the fruit gets into the plant, over a rubber belt there are several women who are picking out any fruit which has noticeable blemishes, which are split or cut, and remove these parts. And we had in our [1094] plant a separate device where this handpicked fruit, which was unsuitable for extraction, was disposed of and an automatic lift took these—picked out oranges, these rejects, to an elevator upstairs, and that was conveyed directly into our dehydrator, where it was mixed with peels and used to make cattle feed.

Q. Was that sorting to eliminate the rotten fruit before or after the fruit passed through the scrubber?

A. No. Before. There shouldn't be any rotten fruit in it.

Q. When the plant was operating at capacity, as you say, of 130 tons per shift, how many of these sorters or pickers would be on this operation?

A. That varied. If we got decent fruit there was very little splits or rots in it. Sometimes two women were just standing and couldn't find any rots. At other times when the fruit wasn't so good, we had four or five or even more.

Q. You don't know, when the fruit starts down this picking table, whether it is going to be good or bad——

A. Yes, we do.

(Testimony of Nicholas J. Winckler.)

Q. How do you know that?

A. Because the fruit is placed in bins, and before it goes into the bins the fruit goes through an electric sampler. Let's say from every 50 or 100 pounds of oranges the electric sampler automatically takes out one. These [1035] samples are divided between the supplier and the processor, and these samples are examined at our laboratory, as well as in the laboratory of the supplier. So before the fruit enters the plant we know exactly what kind of fruit we get. Not only with regard to splits and rots, but also with regard to sugar content and other qualities of the orange that we have to know.

Q. Would you say that you would normally have at least two pickers and sorters?

A. Normally we had more than two.

Q. Two is a minimum?

A. Two is a minimum.

Q. What would you say was a normal staff of pickers when the plant is operating at 130 tons a shift? A. I would say four to five. [1036]

Q. Well, we got off the track a little bit. You had them coming out of the scrubber, I believe?

A. Correct.

Q. I had asked you if anything happened in the scrubbing process to defective fruit. What was your answer to that? That is defective fruit that may have gotten by the pickers.

A. Well, I said that picking was done before it got into the scrubber, so there should be no rotten fruit in the scrubber at all.

(Testimony of Nicholas J. Winckler.)

Q. So you had no picking done after the scrubbing process?

A. We had no picking done after the scrubbing process.

Q. All right. Then after the scrubbing, where does the fruit go?

A. After the scrubbing, the fruit goes to the fruit extraction—rather, juice extraction.

Q. The juice extractors which were used at the Wickler-Smith plant were what are known as citromats, is that correct? A. Citromats.

Q. And how many citromats did you operate?

A. We operated three citromats.

Q. Were those citromats owned by Winckler-Smith or were they rented?

A. They were rented on a royalty basis. They were not for sale at that time, at least. [1037]

Q. Now, will you explain the simple operating principle on which a citromat extracts juice?

A. Gladly. The citromat—when the fruit enters the machine on a little rubber conveyor belt, the rubber conveyor belt leads the fruit against a rotating stainless steel saw. The saw revolves at high speed and cut the oranges into half oranges. The flow of the oranges is continuous on a citromat or onto the conveyors, and as they go, they meet the saw, they are cut into two pieces, and the half oranges are introduced between a rotating stainless wall, and there is——

The Court: Between what?

The Witness: A stainless steel cylinder.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): It is something like a wringer on a washing machine, is it?

A. But much larger.

Q. Yes?

A. Much larger. When the half oranges pass through that citromat under gentle pressure the juice is extracted through a pressing process from the orange.

Incidentally, that pressure is regulated by a pneumatic or air pressure device and the pounds of pressure can be regulated on each citromat, if you want to exercise a higher pressure or a lower pressure.

Q. In extracting juice, the citromat also extracts some [1038] of the peel oil and mixes it with the juice, does it not?

A. Well, it does to a certain extent, that is correct.

Q. Is there some method by which the surplus oil in the freshly squeezed juice is removed?

A. Yes, there is.

Q. Will you describe that?

A. After the juice leaves the citromat, it goes to a so-called finisher. The finisher is, basically speaking, a huge strainer. It is a fine stainless steel mesh. The juice is separated from the pulp and the seeds.

The peel goes through one conveyor and the pulp and the seeds go through another conveyor.

Then the juice goes through a small holding tank into a so-called de-oiling equipment.

(Testimony of Nicholas J. Winckler.)

The de-oiling equipment—now I try to explain it so that the jury and everybody understands it, it is a little involved—is basically speaking a large container from which the air is removed and thereby a vacuum is created.

I assume that the jury knows what that means?

The Court: I think so.

The Witness: Now, the juice before introduced into that vacuum is heated up to approximately 140 to 145 degrees and the hot juice is sprayed into the big vacuum vessel. Under the vacuum the surplus oil evaporates in the vacuum.

Again I like to point out that that equipment is adjustable [1039] by creating a lower or higher vacuum or by introducing the juice at a lower or higher temperature, you can remove more or less of the peel oil.

According to Government standards, the peel oil content cannot exceed .003. We found it most desirable that the peel oil content should not be in excess of .002. We adjusted our de-oiling equipment to comply with that.

If there is too little peel oil, less than .002, we found that the juice tasted flat, because a little bit of presence of peel oil is always desirable in the juice. It is part of the orange flavor.

Then the juice which was heated up in the vacuum had to be cooled down so it just went through a condenser——

Q. May I inject another question?

A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. The de-oiler process not only evaporates off peel oil, but also evaporates off certain of other liquid in the juice? A. That is correct.

Q. Now, that loss of other liquids, the liquids that are evaporated off, would amount to about five gallons for each hundred gallons of the juice processed in the de-oiling, is that approximately correct?

A. Well, I would take exception to the five gallons, because I said it before, that the de-oiler was adjustable. [1040] Sometimes it evaporates as much as five gallons and sometimes it evaporates as little as two gallons, so the five gallons is not a set figure.

Q. Well, then, the oil and the other liquids that had been withdrawn from the batch by the de-oiler go to a separator, do they not?

A. No. The liquids—the oil evaporated, we had no oil recovery, because the oil went out with the vapors. There was no oil recovery. But we recovered, as you stated, the other liquids, which is basically speaking, a part of the water contained in the natural fruit. That was collected in another small stainless steel tank which was a part of the equipment and which stainless steel tank received that condensed other liquids automatically without ever getting in contact with any outside air.

Q. Well, was it the practice of the Wickler-Smith plant then to restore to the extracted juice after de-oiling the same identical liquids that had

(Testimony of Nicholas J. Winckler.)

been taken out of that juice in the de-oiling process?

A. Well, what we call condensate, which I said was two to five gallons per hundred gallons, which was separated by the de-oiling equipment in the receiver, the little stainless steel tank, that automatically went back into the juice because there was nothing added and nothing taken away.

Otherwise, we would have sold concentrated orange juice [1041] instead of single-strength orange juice.

Q. To follow that up a minute, then it isn't permissible when you are making orange juice to be sold as orange juice to introduce tap water into the product, is that correct?

A. That is correct, but that water that we are referring to was not tap water. That was the condensate which came from the orange, and I think you stated before that fancy orange juice means that it doesn't contain anything except what is in the orange.

Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

A. Yes, it is.

Q. What are those tests? I mean what do they test for? I don't want to know what the tests are.

A. Well, I can describe it very briefly. They are tested for soluble content, for the Brix content,

(Testimony of Nicholas J. Winckler.)

which is the sugar content, for the acid content, for the ratio between the acid and the Brix.

Then the cans are tested for the vacuum. The cans, if they are properly sealed, have to show a certain vacuum.

I think they are about the most important steps.

Q. If on testing a batch of juice which has been fully processed and is ready for packing, it is found that [1042] the acid content is too high to comply with the specifications for orange, fancy, we will say—— A. Yes.

Q. ——is there any way in which the acid can be reduced?

A. Not to my knowledge, but I would like to point out that the acid content was checked, not after the juice was already extracted, but it was checked primarily, as I stated before, when we received the load of fruit, and if we received a load of fruit which was not up to the proper standards, we rejected such load. [1043]

Q. All right. But if after you have processed fruit that you have accepted, and your analysis shows that it is too acid to meet government specifications, is there any way in which acidity can be reduced before it is packed in the cans?

A. The only way that I know that it can be done is that you blend a high acid tank with a low acid tank, and by blending the two tanks you bring down the acid content.

Q. Are there some products where it is per-

(Testimony of Nicholas J. Winckler.)

missible to change the acidity if you brand the product something other than orange juice?

A. I have no knowledge of any products or of any way to change the acidity.

I have to state that I am not a chemist. I was managing the plant as general manager, and my burdens just couldn't include all the little details which were involved in production. But I have no knowledge that there is any way in any plant, or in any product, to change the acid content.

Q. After the juice has been tested in the tanks, it is packed in a container of some sort, isn't it?

A. Well, after the juice is de-oiled it is received in so-called vacuum tanks, we had four vacuum tanks at 500 gallons apiece, that the juice was kept under vacuum and under proper agitation, and then the juice was used from these tanks and was introduced through the pasteurizer into [1044] the can filling machines, where the cans were filled, and then they were sealed automatically with the can-sealing machines.

Q. Was the quality of each batch checked in your laboratory after the pasteurization and canning?

A. My instructions were to check the run every 15 minutes, and when I ever had the time I satisfied myself from time to time that these instructions are carried out. Of course, when the plant is running for 24 hours, I have to say that sometimes you have employees who don't carry out always the instructions. But my assumption is, gen-

(Testimony of Nicholas J. Winckler.)

erally speaking, that my instructions have been carried out, and the cans, after they were sealed, have been checked periodically, double checked for the content and the quality, and all the aforementioned essential points, to see that it is Fancy Grade A merchandise.

Q. You mentioned that you weren't able to keep up with every little detail of the operation of this business. You were, after the incorporation of the business, the president and also the general manager of the company during the entire period down to the present or recent bankruptcy, except for the time when the trustee was in possession of the property in late '48 and '49; is that correct?

A. That is correct.

Q. Now, will you tell us to what extent you were able to keep yourself familiar with, let's start in with the operating [1045] practices and the quality of products produced?

A. In the first place, I had the customary executive duties that all business executives have to take care of; to supply the raw product—to obtain the raw product, rather, from which the finished product is manufactured; to decide from which supplier to buy the packing materials, such as cans, labels, cartons. I took a great interest in advertising, sales promotion, and merchandising. I acted more or less as the sales manager of the corporation. I usually had an assistant sales manager who helped me. But I took on the burdens of the sales manager. Then I had the burdens of financing. In

(Testimony of Nicholas J. Winckler.)

years when we produced and sold as much as $1,700,000, and even more, in a small business like ours the financing was sometimes a problem. I felt, and all employees felt, that we did a pretty good job at Winckler & Smith, which is borne out by the fact that our merchandise received good acceptance, that we kept large buyers and customers for a period of seven or eight years, that there was a steady repeat business, that there was a good demand for our brand. If we would have packed merchandise which wouldn't have been up to the grades and standards, our merchandise wouldn't have repeated and sold in fine, big stores, like Safeway and Ralph's and other large chain organizations, both in the East, as well as on the Coast.

Q. We can get into those subjects a little later. I [1046] want to find out how you carried out your administrative and executive responsibilities. You said you were in charge of financing. That meant that you were in charge of the obtaining of capital, and also the maintenance of working capital sufficient to keep your current operations going?

A. I had to see to it that our bills are paid, that there is money for the payroll, there is money for the supplies. I had to see to it that the merchandise is made, that the merchandise is sold, that the merchandise is distributed through 110 food brokers. I had my hands full.

Q. Did you keep in sufficiently close touch with what was going on in the plant so that if the labo-

(Testimony of Nicholas J. Winckler.)

ratory records began to show product inferiority, that that would come to your attention?

A. Well, I did the best I could, but besides——

Q. All right. Now, that is an answer to that one. Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?

A. It definitely would have been, because if a broker is dissatisfied, he either would pick up the phone and call me from New York or Chicago, or would write a letter. And there is one thing that I will state, that no single letter [1047] was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip, they kept the letters, the mail, for me, pending my return.

But to answer the question completely, I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contain navel juice, or was pure navel juice.

Q. What do you say was the dissatisfaction with respect to products containing navel juice?

A. Well, generally speaking——

Q. I want you to describe fully to this jury the only dissatisfaction that you know of that was ever expressed in regard to Winckler & Smith products. Now, you say navel orange products and lemonade. Now, will you tell the jury what dissatisfaction there was with each of those products?

(Testimony of Nicholas J. Winckler.)

A. On all products, on any product?

Q. Any product. You said there were only two. lemon juice and products——

A. No. We had a good number of products.

The Court: Now, wait a minute.

His statement was dissatisfaction with navel juice and products containing navel juice.

Mr. Strachan: All right.

Q. I want you to tell us the full extent of the dissatisfaction that was expressed, to your knowledge, with [1048] respect to any Winckler & Smith products.

A. Well, sir, that is a big order, but I will try to answer it to satisfy the court, the jury, and yourself.

In the first place, let me start out this way: There isn't a manufacturer in the country, I don't care if it is food, citrus, or radios, who doesn't have some complaints from time to time. What builds brand acceptance is not if there is Miss Jones or a Mr. Jones who is complaining about something, but how frequent these complaints occur, and in what proportion these complaints are in proportion to the satisfied consumers. Now——

Q. You say you have got a big order there. Now, tell us just how much dissatisfaction was expressed with Winckler & Smith products, identifying the products.

A. I would say probably 1/10th of 1 per cent compared to satisfied customers.

(Testimony of Nicholas J. Winckler.)

Q. No. Will you tell us what products were complained against?

A. Some people complained when we ever packed navel juice. The reason for the complaint——

Q. No. Just name the products, please.

Mr. Dixon: I think the witness is entitled to answer.

Mr. Strachan: We will get——

The Court: You asked a big question. Let the witness do it his way, and then you can go back and pick up the ends. [1049] Your question was very, very broad. Now, let him answer it.

The Witness: Navel juice doesn't lend itself too well for canning. That is a very well-known fact. Because it turns bitter in the canning process. You can't use it even for concentrating or freezing. Still, at times when there was a shortage on Valencia juice, some buyers insisted that we should offer them the next best substitutes, and that was navel orange juice, or navel blend. We always called their attention to it, that navel juice makes a bitter juice. There are some buyers who will put anything on the shelf—there are careful buyers and there are careless buyers—as long as the product is priced below the competitors' product, and as long as he can make a quick turnover on it.

I am using simply hypothetical figures. At a time when Valencia orange juice would have sold, for instance, for $3.00 a case—and this is just an example—navel juice probably would have sold for

(Testimony of Nicholas J. Winckler.)

$2.00 a case. So certain buyers wanted the navel juice, and we cautioned them that navel juice is bitter, and some of your customers are going to complain. They said, "Well, leave that worry to us." So we put on the Anapride label and we packed navel juice or navel blend.

So we got two or three complaints, sometimes either from the grocery store or from some of the consumers, who wrote in a letter and said, well, the juice wasn't good, it was bitter, [1050] we didn't like it.

So at this time we usually, to appease them; we wrote a letter that we are very sorry, and sent them a replacement. Usually we had on hand, always, a few cases of Valencia juice, and would send them that juice. That was the complaint—— [1051]

Q. You always replaced the juice that was complained against?

A. We always replaced juice which was complained on to consumers, and it happened very, very seldom.

Q. What about grocers?

A. Well, the contract called for navel juice and we cautioned the grocer that the navel juice is bitter, we had no reason to replace it and we couldn't replace it. If we had Valencia juice available, we would have shipped Valencia juice, but the order called for navel juice. The order called for an inexpensive juice at a time when Valencias were either unavailable or scarce, so the best thing to do is that we ship now—to bear out that, navel juice

(Testimony of Nicholas J. Winckler.)

maturing in the winter of 1950, we shipped considerable quantity of navel juice and navel blend to Western Canada. I think it was 30 or 40 carloads, and to my best recollection, we didn't have a single complaint.

In Canada, people had no objection against the bitter taste. Just like Canadian and English people like the bitter type marmalade, while the average American public likes the sweet marmalade. So there is no absolute truths of what is good and what is worthy of complaining.

There is no question about it, navel juice has the bitter taste and people who don't like it shouldn't buy it.

So I come up to navel. Now, let me say there was another [1052] complaint which comes to me, and I am trying to think of all the complaints. We had a complaint from Mr. Finley in 1947 when we packed for him pasteurized orange concentrate. His complaint was that there were black specks in the orange juice, in the orange concentrate. Well, we did the best what we could. We scrubbed and washed the oranges the best we could do it, but there was still black specks.

At the same time I have definite knowledge about it, because I saw it with my own eyes, that Mr. Finley at his own plant had the same trouble, and the juice was put through on an illuminated table, and I don't know how many women there were with little rubber hoses and with a vacuum drier to pick out the black specks by hand from the juice.

(Testimony of Nicholas J. Winckler.)

Now, we couldn't afford to do that, because that would have made the packing cost prohibitive. I don't know if Mr. Finley is still practicing that method, but if there wouldn't be any black specks in his juice, he wouldn't have had that girl picking out with a vacuum tube the black specks.

Q. Was that a low temperature concentrate?

A. No, not a low temperature concentrate. It was pasteurized concentrate.

So we had a complaint from Mr. Finley in 1947, but that didn't prevent Mr. Finley very kindly, and I thank him very much for it, to give us again a nice processing contract in 1948. [1053]

Q. But that was with the trustee in bankruptcy and not under your management, isn't that a fact?

A. Well, the trustee——

Q. The trustee was operating the plant at that time, wasn't he?

A. The Long Island Railroad was run by a trustee for 14 years.

Q. But the trustee in bankruptcy was running the plant at the time Mr. Finley gave him the processing contract, wasn't he?

A. The trustee had the power, but mechanically at that time I was running the plant.

Q. The trustee in bankruptcy had the credit, didn't he?

A. Well, I negotiated that deal with Mr. Finley, and if you want to see it, I have a letter here to that extent, and I am very glad to put it on the court's——

(Testimony of Nicholas J. Winckler.)

Q. It was the trustee in bankruptcy that wrote a letter thanking Mr. Finley for co-operating in order to help the estate out, isn't that a fact?

Isn't that a fact? Yes or no.

A. You want me to tell you the story?

Q. Yes or no.

A. That is not a question which can be answered yes or no.

The Court: You can answer yes or no first and then explain. [1054]

Did the trustee in bankruptcy—was this a trustee in bankruptcy or a trustee in a reorganization proceeding? I don't remember.

The Witness: It was a receiver, because the Chapter 11 calls it a receiver.

The Court: Did he write the letter to Mr. Finley, if you know?

The Witness: If he wrote a thank you letter after everything was completed, he didn't ask my permission for it so I haven't seen it.

The Court: Now what do you want to explain?

The Witness: What I like to explain is the circumstances of the deal.

Mr. Strachan: There is no question pending.

The Court: You mean concerning this——

The Witness: Concerning that processing——

The Court: The contract with Mr. Finley?

The Witness: The contract with Mr. Finley.

The Court: Well, that's all right. Mr. Dixon can ask about that on redirect.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): What other complaints did you hear about, if any?

A. Well, I am trying very hard, but I have no recollection of any other complaint at the moment. If you can show me [1055] any other complaints and have some evidence, I am going to admit it, if it is a justified complaint.

Q. Mr. Winckler, you testified that in the fall of 1944 you heard that this plant at Anaheim was for sale. Did you inspect the plant about that time?

A. Yes, I did.

Q. Was the plant at the time you inspected it in operation? A. Yes, it was.

Q. By whom was it being operated?

A. It was operated by a lessee called the Caltone Corporation.

Q. Who was the owner?

A. The owner was a corporation called Lash, Incorporated, L-a-s-h.

Q. What was the condition of the plant and its equipment at the time you inspected it?

A. Very bad.

Q. What was the condition of the buildings?

A. Some buildings were good and some buildings were in fair shape.

Q. What was the condition of the machinery and equipment?

A. Well, let me, if I may, make a statement here. I have not bought anything of the machinery and the [1056] equipment. That was removed from the plant when I purchased it. I bought only one

(Testimony of Nicholas J. Winekler.)

boiler, the buildings with the railroad track, and some fruit bins, which I threw out the first year, and except for the shell of a vacuum pan, a big stainless steel pan, there wasn't a single piece of machinery or equipment which I took over.

I bought brand new machinery and I put in machinery, equipped the plant according to my own specification.

The Court: Well, the question was what was the condition of the machinery and equipment in the old plant.

The Witness: I said, your Honor, it was very bad.

Mr. Strachan: In view of the explanation, I would just as soon eliminate that question.

The Court: All right.

Q. (By Mr. Strachan): Then at the time you became the owner of the plant, it was not a going citrus fruit plant, was it? A. No, it was not.

Q. How long had it been idle?

A. We supposed to have taken over the plant around March 1st, but the lessee——

Q. That is March 1st of 1945?

A. Of 1945, but the lessee did not live up to its promise or agreement to give us possession by March 1st and kept us out from the plant until the latter part of April. [1057] By that time they removed all their equipment and they moved into a new plant which they bought simultaneously in Anaheim.

(Testimony of Nicholas J. Winckler.)

So I actually took possession of the plant very close to May 1st.

Q. Now, you purchased the plant and the small amount of equipment that you have mentioned as an individual, did you?

A. Well, it was a partnership. I purchased it in the name of a partnership.

Q. My recollection was that you said you first acquired it as an individual.

A. That is correct.

Q. Then later found that the business required——

A. That is correct. I purchased the plant as an individual.

Q. When?

A. Oh, I think the purchase agreement was signed sometime in January, 1945, either the latter part of January or the very early part of February, 1945?

Q. What purchase price did you agree to pay?

A. The purchase price was $60,000 for the empty plant, if I pay before a certain date, and $64,000 if I pay after a certain date.

Q. Was this purchase price all in cash?

A. That was all in—well, the purchase price has to [1058] be paid all in cash, and during 1945, before the deadline, it was paid all in cash.

Q. Did you finance the purchase with a mortgage or any other encumbrance of the property?

A. No, sir. We started operations——

(Testimony of Nicholas J. Winckler.)

Q. Now, just a minute. You said you personally purchased it.

A. I personally purchased it. I made a down payment.

Q. How much was the down payment?

A. $10,000 in escrow. The escrow—the condition of sale called that the escrow has to be kept open, I don't know exactly now whether four months or five months, something like that, and then when we paid the balance, the difference between the 10,000 and the 60,000, we write a check of an additional $50,000, and then the property is deeded to me.

Q. When was the last payment on that purchase price made?

A. My recollection is that it was made sometime in November, 1945, in full, but I missed the deadline by four weeks and we had to pay $64,000 instead of $60,000.

Q. Did you borrow anything on the plant?

A. Not a penny. We made enough profit in 1945 to pay for machinery and plant, for everything cash. [1059]

* * *

Q. (By Mr. Strachan): In March, I believe March 10th, you formed a partnership to conduct this Winckler & Smith business, did you not?

A. That is correct.

Q. March of 1945? A. That is correct.

Q. The partners were yourself, M. E. Goodland, and E. J. Smith?

A. No, sir. In March, when the partnership was

(Testimony of Nicholas J. Winckler.)

formed, there were only two partners; Bernard J. Smith and myself.

Q. What was Mr. Smith's business prior to joining this partnership?

A. Mr. Smith told me that he was in the trucking and bus business in Chicago, and prior to coming to California he sold out his business to the Burlington Railroad and came to California to retire, but he just didn't know what to do with his time, so he took up real estate and became a real estate broker. So Mr. Smith was in California in the real estate business for about two years when I met him.

Q. Had he been in the food processing business?

A. He had never been in the food processing business.

Q. How much capital did Mr. Smith contribute to that original partnership? [1061]

A. According to our agreement, Mr. Smith committed himself to contribute $50,000 to the partnership.

Q. How much did he pay into the partnership at the time it was formed?

A. Mr. Smith paid in several installments, he had to liquidate to sell some first trust deeds in order to make the money liquid, and finally he couldn't come up with more than $40,000, and then Mr. Smith suggested that his neighbor, a certain Mrs. Campbell, next-door neighbor, would put up the $10,000 that he was unable to put up, and Mrs. Campbell is the mother of that certain Mr. Good-

(Testimony of Nicholas J. Winckler.)

land that you mentioned. So Mr. Goodland joined as a partner, I think in July, 1945. [1062]

Q. And he paid in how much capital?

A. $12,000.

Q. Your own contribution was $10,000, was it not?

A. Yes. It was $10,000, but I told Mr. Smith——

Q. Well, now, just a minute. I don't think conversations outside of the presence of the parties are admissible.

Was that $10,000 paid in cash?

A. It was exactly $12,000 paid in cash.

The Court: He is talking now about what you put in.

The Witness: Yes.

Q. (By Mr. Strachan): You put in $10,000?

A. Yes, $12,000.

Q. Your contribution was $10,000, was it not?

A. No, it was $12,000. It is coincident it was identical with the 12,000 that Mr. Goodland put in. There is no connection between the two twelve thousands. I may clarify that——

Q. Now, just a minute.

The Court: Let the witness finish his answer.

Mr. Strachan: Sir?

The Court: Let him finish his answer. Proceed.

The Witness: Out of the 12,000, 10,000 was put up by me into the escrow and 2,000 was used for the partnership outside of the escrow, making my total cash investment of $12,000. [1063]

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: May this be marked for identification?

The Clerk: Defendants' Exhibit A for identification, your Honor.

The Court: Exhibit A marked.

(The exhibit referred to was marked Defendants' Exhibit A for identification.)

Q. (By Mr. Strachan): I will show you, Mr. Winckler, a certified copy of the documents on file on Winckler-Smith Corporation with the Commissioner of Corporations of the State of Illinois——

The Court: State of Illinois?

Mr. Strachan: I am sorry. California. Thank you.

Q. ——which contains, among other things, the letter that I show you, addressed by Hodge Moore & Company to Winckler-Smith Company attaching a balance sheet as of January 31, 1946, from the books and accounts of the partnership.

Do you recognize that letter?

A. Yes, I do.

Q. Do you recognize that balance sheet?

A. Yes.

Q. I ask you if it isn't a fact that that balance sheet shows the following as the original investment of the partners:

M. E. Goodland—$12,000.

B. J. Smith—$40,000. [1064]

N. J. Winckler—$10,000.

Total—$62,000.

(Testimony of Nicholas J. Winckler.)

A. That is correct. May I explain?

The Court: Yes.

Mr. Strachan: Do you want him to explain now or on redirect?

The Court: He may explain it now. It is customary for a witness to explain his answer at the time.

The Witness: It doesn't make any difference whether or not my investment is $10,000 or $12,000, but as I stated before, that 10,000 was put into the corporation and went into escrow to purchase land and improvements of the plant, and $2,000 I expended in behalf of the partnership in the acquisition of the plant which was not accounted for—it didn't make any difference, but I mean that $10,000 in round figures went into escrow and it is quite obvious somebody buying a plant has some expenses besides the $10,000 which goes in a lump sum in escrow, so that is what explains the $12,000.

But it doesn't make any difference whether you figure $10,000 or $12,000 investment. The smaller it is, the prouder I am that I made a success out of it.

The Court: The last statement may go out. Go ahead.

Q. (By Mr. Strachan): Hodge Moore & Company were the certified public accountants of Winckler-Smith, were they not? [1065]

A. That is correct.

Q. If Hodge Moore is right, the total investment was $62,000, and if you are right it is $64,000.

(Testimony of Nicholas J. Winckler.)

Now, as of the close of business, January 31, 1946, Winckler & Smith Citrus Products Company, a corporation, acquired the business of the partnership, did it not? A. That is correct.

Q. At that time the partnership had on hand $100 in cash, according to this balance sheet, had it not?

A. I haven't seen it. If you state so, I take your word for it. [1066]

Q. Thank you.

The current assets were less than $50,000, that is, the inventories, accounts receivable, were less than $50,000, is that correct, or don't you remember?

A. If the balance sheet states so, it is correct.

Q. The current liabilities were over $75,000. Now, the corporation's books were set up so that they did not reflect the original investment in the assets, but rather the investment plus a write-up by appraisal, and that write-up amounted to $150,000, did it not?

A. Well, if the balance sheet shows these figures, then it is so. I would like to explain if I may.

The Court: Go ahead.

The Witness: When I purchased the plant for 60 or 64 thousand dollars in January, 1945, it was a sale through this federal court, and the sale took place in the court room of the late Judge Hollzer. It was a distressed sale, just like when our plant was sold it was a distressed sale by the receiver, and I felt that when I purchased the plant for 60

(Testimony of Nicholas J. Winckler.)

or 64 thousand dollars I got a bargain. Every businessman has a right to purchase a bargain.

The Court: In these explanations, just stick to your facts and don't argue the matter.

You thought it was worth more than $64,000?

The Witness: It was worth more than $64,000, and when I [1067] made the partnership with Mr. Smith I revealed to Mr. Smith for how much the plant was purchased, but I told him that I was unwilling to put in the plant at my acquisition price. So my contribution was $10,000 in cash or $12,000, whatever the case may be, plus the value in the plant, which was in excess of the $60,000 that I acquired the plant at the federal court.

The Court: All right.

The Witness: So when we set up our corporation and we had to issue shares to the former partners, we felt that we have the right to put a realistic value on the plant to carry it on our books.

If I recall correctly, counsel mentioned that that opening financial statement showed liabilities of $75,000 and current assets of $50,000. So that showed a deficiency of $25,000. But in order to evaluate these figures I want to say that during six months of operations with the $62,000 starting capital, we paid in cash for the plant, and we paid in cash for all the machinery that have been installed in this plant.

The Court: All right. You have made your explanation.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): How much had you invested in that machinery?

A. If I could see the financial statement, I wouldn't have to guess and I could say exactly.

Q. I will show it to you. [1068]

A. Well, machinery and equipment shows eighty-eight, almost eighty-nine thousand dollars.

Q. That is cost? A. That is cost.

Q. Now, when was that money spent?

A. That money was spent during 1945, from the day that we moved into the plant, which I said was approximately May 1st, 1945, between May 1st and January 31st we spent in cash about $89,000 for machinery——

Q. Just a minute. On this machinery, that is in about seven months you spent $88,000 in cash on machinery?

A. Well, I have to qualify that. There is probably a small portion of that $88,000 included for the one boiler and for that empty shell of the vacuum tank, which I testified before was the only two items taken over from the former owners. So that should be included in the $88,900.

Q. All right. Deducting the value of the old boiler and the evaporator, whatever it was, from the $89,000 of machinery and equipment cost, how much of that would you say was spent in the seven months by the partners?

A. I can approximately state. Let me do a little figuring here. That is all machinery and equipment except the first two items, buildings and land at a

(Testimony of Nicholas J. Winckler.)

total of $17,000, which is allocated to land and buildings. If we deduct the $17,000 from the $123,000 or $124,000, that leaves for [1069] machinery, equipment, tools, trucks, furniture, fixtures, and so on a total of approximately one hundred seven if I am correct. Yes, one hundred seven. From the $107,000 I would say that probably $7,000 is represented by equipment taken over, and about $100,000 was spent for machinery and equipment, truck trailers, and so on. [1070]

Q. Can you estimate how much of the 89,000 of cost of machinery and equipment was represented by the old boiler and the other equipment that you took on in the plant?

A. Probably you misunderstood me. I just said that I estimate approximately $78,000, which would leave a net purchase for new equipment of roughly $100,000.

Q. No. I am talking only about this 89,000 machinery and equipment. A. Yes.

Q. Of the cost of the machinery and equipment, as shown here on the balance sheet, as about 89,000.

A. Correct. I would say about $7,000 was allocated for the old equipment.

Q. That would mean that the machinery and equipment paid for in cash by the partnership in the seven months of the partnership, the equipment was, say, $82,000?

A. You mean for new equipment?

Q. Yes. A. Correct.

Q. Then by this write-up on the appraisal, you

(Testimony of Nicholas J. Winckler.)

increased the machinery and equipment from 89,000 to $153,000?

A. I can explain that, too.

Q. If 80,000 of that was bought in five months, how do you write that up 70,000?

A. Well, I can explain that. When you buy machinery [1071] and equipment, according to the invoices you get one figure. If you add to the machinery and the equipment the freight, most of the machinery comes from the East, plus the installation charge, plus the wiring and plumbing and piping, which really is improvement of the property, which becomes valueless if we moved, I would say that in order to install $90,000 worth of equipment, you have to spend at least another $40,000 or $50,000.

Q. You mean to say where the machinery cost is shown at $90,000 that doesn't include all the cost of transportation and installation?

A. Definitely not installation, definitely not wiring, definitely no plumbing or piping. Maybe the freight from the East. Maybe that is included.

The Court: Let me ask, do you intend, Mr. Strachan, to go into the question of value of the plant in 1951?

Mr. Strachan: I want to show to what extent the valuation which the books put upon the plant was entirely fictitious valuation, and I am building that up by showing how much of it was cost and how much was write-up.

The Court: Well, we are only going to do it

(Testimony of Nicholas J. Winckler.)

once. If you are going to do it in 1951, which is the ultimate question——

Mr. Strachan: This is leading up to it.

The Court: All right.

Q. (By Mr. Strachan): The item of buildings is shown [1072] to have cost 14,572. In the write-up there was 82,000 added to that, bringing it up to nearly 97,000, is that correct, on the face of the balance sheet?

A. On the face of the balance sheet, that is correct.

The Court: Now, just a minute. Have you finished your answer?

The Witness: Yes.

The Court: I may be confused, but as I read this statement, the column that you have been referring to as the cost column for land and building is apparently the amount that was paid.

Mr. Strachan: That's right. That is the amount that was set up on the partnership books as the cost of the buildings, the land and buildings.

The Court: The two items, land and buildings, are set up at a little less than 17,000.

Mr. Strachan: $17,000.

The Court: I notice on the other side of liabilities the notes payable, $41,000.

Mr. Strachan: That's right.

The Court: It would look to me as if this statement was prior to the time that the balance of the $60,000 had been paid.

The Witness: No, your Honor. At that time the

(Testimony of Nicholas J. Winckler.)

full balance was paid and the plant was free and clear of any [1073] encumbrance.

The Court: Then why is the plant and the buildings set up for less than $18,000 in your cost column, when you testified you paid $64,000 for it?

The Witness: Well, the $64,000 is allocated between land, buildings, machinery and equipment, and improvements on leased property and so on. The $62,000 is included in the $128,000.

Now, how the accountant split it up, how much he allocated for machinery, how much he allocated for buildings, I don't know. We had no appraisal made prior to January 31, so it is strictly the CPA's arbitrary appraisal, how he split up the value of $62,000 between real estate, buildings, and the improvements.

The Court: Are you certain that this is not set up on the basis of the exact amount that had been paid in on that date on land and buildings?

The Witness: Yes, your Honor.

The Court: What was the $41,000 note?

The Witness: The $41,000 note was the bank loan that we borrowed from the First National Bank in Fullerton.

The reason I am certain it is not what we paid for it is because when we purchased in the Federal Court, and the records are still available here, I am certain, the plant, or the shell of the plant, rather, there was a purchase price agreed on of $60,000 or $64,000, without saying how much we paid [1074] for buildings and how much we paid for machinery,

(Testimony of Nicholas J. Winckler.)

and it was a blanket price. That breakdown of the accountant was according to his best judgment, but in order to help counsel, I can allocate very easily the figures, how we arrived at it.

The Court: Are you going to offer this exhibit, Mr. Strachan, this balance sheet? There has been a lot of testimony about it.

Mr. Strachan: Yes, I intend in my case to offer it.

The Court: Can we mark it B for identification at this time?

Mr. Strachan: It is a part of the larger exhibit.

The Court: It is part of A?

Mr. Strachan: Yes, sir.

The Court: We will call the particular sheet we have been talking about, then, A-1 for identification.

Mr. Strachan: I might say, anticipating a procedural question, that of this bulky document, there are only parts that are going to be material, and I think perhaps I would ask to be allowed to make a selection of parts and substitute those at the time of the offer.

The Court: You can do that by photostats.

Mr. Strachan: Yes.

The Court: All right. A-1 will be marked for identification only as the balance sheet we have been looking at. [1075]

(The exhibit referred to was marked Defendants' Exhibit A-1 for identification.) [1076]

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): In the succeeding years down to the time of the discharge in—what was it, the Chapter 10 proceedings in 1949?

A. Chapter 11.

Q. ——the corporation continued to operate and made some improvements to the property and made some charges for depreciation of the property, so that at the time of the discharge the property was shown on the books as $368,000, approximately, was it not?

The Court: Are you talking now—when you say the value of the property, are you talking about the land and the improvements and the equipmer

Mr. Strachan: The items are shown here as follows, are they not——

The Witness: Whose statement is that, may I ask? Is that our accountant's statement?

The Court: Is this also from Exhibit A?

Mr. Strachan: Yes, this is a part of the exhibit which is on file, filed by Winckler & Smith with the Commissioner of Corporations.

The Court: We will mark this next sheet that you are referring to as Exhibit A-2.

(The document referred to was marked Defendants' Exhibit A-2 for identification.)

Mr. Strachan: All right. [1077]

Mr. Dixon: It looks like the receiver's statement, if I read correctly.

The Witness: I think it is the receiver's state-

(Testimony of Nicholas J. Winckler.)

ment. That is the reason I like to clarify these points. Let's bring it out.

It is not made by our auditor, I am sure. I think it is probably the receiver's statement. However——

The Court: Is there any question pending now?

Q. (By Mr. Strachan): Do you recognize what this is?

A. Well, I recognize that it is a financial statement, but I don't recognize by whom it was made.

Q. Well, it was filed with the Commissioner of Corporations, was it not, in connection with your application to issue securities?

A. Then it was probably—no, that had nothing to do with securities. We issued——

Q. No. But it is filed in connection with permission, this is one of the facts disclosed to the Corporation Commission?

A. I am trying to say, it is not.

The Court: Mr. Winckler, this whole file, Exhibit A, has been identified as the copy of the file from the Commissioner's office. Let's see. Where does this appear?

Mr. Strachan: It is a resume of the history, your Honor.

Mr. Dixon: If it please the court, there may be a lot of [1078] things in that file that the plaintiff corporation never filed. I don't know what is in that file. It is quite a bulky file.

If this witness knows that this corporation filed it, that is one question. But to ask him whether every paper in that file was filed by the corporation, it

(Testimony of Nicholas J. Winckler.)

seems to me, just because it appears in the file, it seems to me to be an improper question, unless he can so testify.

The Witness: I am certain that our application to issue securities was not as bulky, by far, and we applied to issue securities in May, 1951, two and a half years later than the statement was made.

That is the only time that we applied to issue securities. So why should there be a '49 statement enclosed in there?

The Court: This is the file as you got it from the Corporation Commissioner's office?

Mr. Strachan: Yes.

The Court: What I am thinking about is that they sometimes have lots of things in their files. I was trying to identify this.

Doesn't the Commissioner number his files serially page by page?

Was Ellis S. Patterson your attorney?

The Witness: Earl S. Patterson. [1079]

The Court: Ladies and gentlemen of the jury, we are trying to look over a file of the Corporation Commissioner. In this file, it demonstrates, and the witness has told you, that Earl S. Patterson was his attorney; and there is an Exhibit H, among various other exhibits submitted to the Corporation Commissioner, which shows a balance sheet of January 31, 1949, and it says "Prior to court approval of discharge." So that this date is the date when Winckler & Smith was in the bankruptcy court under a reorganization proceeding under Chapter 11.

(Testimony of Nicholas J. Winckler.)

The record, I think, shows or will show it came out of reorganization in March, 1949, sometime afterwards. We don't know who prepared this sheet or where the figures come from, but it doesn't make a whole lot of difference. Maybe it will be identified later on.

The point agreed upon between counsel is that it was submitted to the bankruptcy court by the attorney for the Winckler-Smith corporation, a balance sheet involving the time when it was under the Receiver.

Do you follow me?

Now, I say it doesn't make any difference. We probably will find out before we get through where the figures come from and what this report is based on. This didn't happen, but to give you a little example, if Patterson, the attorney for Winckler-Smith, had got a figure out of his head and [1080] gave it to the Corporation Commissioner, it was still part of the file submitted to the Corporation Commissioner.

All we know is that it was a sheet involving the receivership submitted by the attorney for Winckler-Smith. There is a lot to do about it, but that will give you some little picture of it. Is that all right, Mr. Strachan?

Mr. Strachan: Yes. [1081]

* * *

Q. Mr. Winckler, when we took an adjournment last evening you had just referred to the fact that

(Testimony of Nicholas J. Winckler.)

at the time of the arrangement made with creditors in the spring of 1949 the fixed assets at March 1, 1949, had a gross value on the books of $368,000 with a depreciation deduction of $68,000, leaving a net book value of $300,000; do you recall that?

A. Are these the figures in the statement that we checked together?

Q. Yes, and they also check with Hodge & Company's report here. If you would like to see it I can show it to you.

A. If it checks with Hodge & Company, then that is all [1093] right.

Q. Those book values included the $150,000 of write-up; that is correct, isn't it?

A. 150,000 what?

Q. Write-up on the appraisal we discussed yesterday. A. No, I don't believe so.

Q. You say that that $368,000 did not include the $150,000 that was based on the appraisal?

A. It definitely did not.

Q. Now, following March 1st you concluded this arrangement with your creditors, and in order to do that you sold the fixed assets under a lease-back and repurchase agreement, did you not?

A. That is correct.

Q. And that included all of the $309,000 of fixed assets then on the books? A. That's correct.

Q. To whom were those assets sold?

A. Those assets were sold to two men, a Chicago attorney called Maxwell Rubin and Albert B. Parwin, and there was a silent partner in the deal.

(Testimony of Nicholas J. Winckler.)

Q. Was Mr. Rubin a stockholder of Winckler-Smith Corporation? A. Not at this time.

Q. Was he at any time?

A. He became a stockholder later on. [1094]

Q. The cash that was received for the $309,000 of assets amounted to $50,000, didn't it?

A. Yes, and assumption of some indebtedness.

Q. Under the lease-back arrangement the corporation continued to occupy the plant and use the equipment, did it not? A. As a lessee.

Q. And they paid rent? A. Correct.

Q. How much rent did they pay?

A. $18,000 a year, plus approximately $6,000 real estate and personal property taxes, plus approximately $1,200 to $1,300 fire insurance. We carried about $450,000 fire insurance against the plant.

Q. The repurchase agreement provided that you could exercise the option to repurchase any time prior to March 1, 1951, did it not?

A. No. May I explain that arrangement to clear up the matter?

Q. Yes.

A. We sold the plant for $50,000 cash, subject to a $90,000 RFC loan, which would indicate a total purchase price of $140,000. We realized that the plant was worth substantially more money. However——

Mr. Strachan: I move to strike his realization. That [1095] is not explanation.

The Witness: Correct.

Mr. Dixon: I think it is.

(Testimony of Nicholas J. Winckler.)

The Court: Motion denied.

The Witness: However, we regarded that as an out from a distressed situation, and as long as the repurchase price was in line with the sales price, we had no other choice than to accept the deal and what the deal amounted to, that the plant which was sold for $140,000 could be repurchased for $190,000, and the repurchase price was set till 1951 at this price. Then it increased for the next year by an additional $25,000; in another year with an additional $25,000; and the option was in force all together for a period of five years, to 1954.

The Court: The first option for which you could buy it back for 190 ran out in 1951, did it?

The Witness: According to my best recollection, your Honor.

The Court: All right.

Mr. Dixon: If the court please, I don't want to interrupt, but this will help counsel if he doesn't already have it. We have the original agreement here which he referred to. Do you wish it, counsel?

Mr. Strachan: I will avail myself of that later. I can't, of course, do it right now. [1096]

The Court: Then if the option is exercised within a year later, 1952, it was an additional $25,000?

The Witness: Additional $25,000, and another additional $25,000 two years later, and that option was good for a period of five years all together.

Q. (By Mr. Strachan): Now, at the time you repurchased this property from Rubin, that was in the spring of 1951, was it not?

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. What was the option price?

A. The option price was a total of approximately $200,000—$150,000 in stock and cash and then, of course, the then existing RFC balance of approximately $51,000.

Q. At the time that property was repurchased, was Mr. Rubin a stockholder of the Winckler-Smith Corporation? A. Yes, he was.

Q. Was he also an officer or director?

A. He was both an officer and director. [1097]

Q. Shortly prior to buying, repurchasing this plant and equipment, your fiscal year ended on January 31, 1951, did it not?

A. Well, the fiscal year following the reorganization ended January 31, 1950.

Q. No. I am talking about the repurchase. Your repurchase was in the spring of 1951?

A. That's correct.

Q. And it was after the close of the fiscal year, which ended January 31, 1951?

A. That's correct.

Q. Now, before you repurchased these assets, your fixed assets on the balance sheet in January of 1951, represented approximately $91,000, isn't that correct? A. No, I cannot see that figure.

The Court: How many of the ladies and gentlemen on the jury know anything about bookkeeping? Hold up your hands.

(Raising of hands.)

(Testimony of Nicholas J. Winckler.)

The Court: How many know the difference between a fixed asset and a current asset?

(Raising of hands.)

The Court: How many know the difference between a fiscal year and a calendar year?

(Raising of hands.)

The Court: Let me make a few general statements that I [1098] hope counsel won't object to. It may assist in understanding this.

Taxpayers may report either on what we speak of as a calendar year, which is from the first of January to the end of December, or a fiscal. If they take a fiscal year, they can break their year at any place along the line. So in the case of this particular corporation its fiscal year was apparently running from February 1st of one year around until January 31st of the other year. That is what is spoken of as a fiscal year. It is a break somewhere else other than the calendar year, December 31st.

In bookkeeping you have two general terms with reference to assets. Fixed assets and current assets.

Are those the two terms that we generally find in statements?

I am no expert, either.

Fixed assets refer generally to real estate, buildings on real estate, major improvements on real estate.

Do fixed assets go further than that?

The Witness: Machinery and equipment.

(Testimony of Nicholas J. Winckler.)

The Court: Is that about fixed assets?

Mr. Strachan: I think that is substantially it.

The Court: Then current assets are ordinarily the personal property, furniture, bank accounts——

Mr. Strachan: I wouldn't want to agree with that, your [1099] Honor.

I would say that current assets——

The Court: As contrasted to fixed assets?

Mr. Strachan: Usually you have fixed assets, and other assets besides your current assets.

The Court: Then we will break it down that way. First the fixed assets, which we have described, and then other assets. Well, the other assets are generally in the nature of personalty or credits, stocks or bonds. By personalty I mean personal property, automobiles; if the company had a bakery business. they might have a fleet of automobiles; furniture that is movable, and things of that sort. Then of these other assets, which I referred to as current assets, ordinarily, at least in one sense of the word, those assets which could readily be converted into cash, so your accounts receivable would be considered as a current asset, bank accounts; if you had some Government bonds or stocks, if you had credits due, and things of that sort, they are the things which are current or liquid. So you have two breakdowns, first of all, fixed assets and other assets, and then part of the other assets may or may not be current or liquid.

I am particularly interested that you understand

(Testimony of Nicholas J. Winckler.)

fixed assets, because that is what is being discussed.

Do you want to add anything to that, counsel?

Mr. Dixon: I think inventories are generally covered [1100] as fixed assets, also.

The Court: Yes, inventories, goods on hand, and things of that sort.

Now, this is not too comprehensive a statement, because I am no professor of bookkeeping or accounting.

All right, Mr. Strachan. [1101]

Q. Hodge and Company were your auditors, weren't they? A. That is correct.

Q. Do you recognize that as a letter from Hodge and Company? A. Yes, I do.

Q. And accompanying——

Mr. Dixon: What is this, counsel? Is this something I haven't seen?

Mr. Strachan: Something you furnished to us.

Mr. Dixon: I did not furnish it to you.

Mr. Strachan: You or your client did.

Mr. Dixon: No. Don't make that statement, counsel.

Mr. Strachan: That is the only way we could have gotten it.

The Court: The jury will disregard colloquy between counsel.

Mr. Dixon: Is this from the files of the plaintiff corporation, counsel?

Q. (By Mr. Strachan): Mr. Winckler, it is, isn't it? A. May I see——

Mr. Dixon: I am asking you, is it?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: He is the witness.

Mr. Dixon: If it is, it is all right.

Mr. Strachan: He is the witness. He recognized it.

The Court: All right. Now, gentlemen, there is a [1102] proper way to do these things and let's do it properly. First of all, if you bring a document out, Mr. Strachan, the practice in this court is, if it has not been previously exhibited to counsel, to exhibit it.

Secondly, if you are going to use a document in the examination of a witness, before it is shown to the witness, hand it to the clerk and have it marked for identification so we know what we are talking about.

Mr. Strachan: Very well.

The Court: In a case of this kind, ladies and gentlemen of the jury, there has been extensive discovery. Discovery is a technical word which means the right of either side to secure information about this lawsuit from the other side. As you have observed as this case went along, there has been a lot of work done which you must obviously know occurred or it wouldn't have been possible to have various of these papers available ready for production. So these various documents are properly obtainable by either side in connection with the case.

Now, proceed, Mr. Strachan. Let's have the document marked for identification. Is it part of another document that was heretofore marked or is this something new?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: This is a complete document.

The Clerk: Defendants' Exhibit B, your Honor, for identification. [1103]

The Court: Exhibit B.

(The document referred to was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the document that has been marked Defendants' Exhibit B, entitled Winckler & Smith Citrus Products Company Financial Statement, January 31, 1951, Hodge and Company, Certified Public Accountants, 205 South Beverly Drive, Beverly Hills, California. I ask you if you have seen that document or the original of which that is a facsimile before?

A. Yes, I did.

Q. Now, I am calling your attention to the balance sheet, which is the next to the last page of that exhibit, and ask you if it isn't a fact that the fixed assets as shown on that balance sheet represent machinery and equipment, $70,000; furniture and fixtures, $7,300; leasehold improvements, $20,000; tools, $183.00; total before depreciation $97,800; less depreciation and amortization, approximately $92,000 in total fixed assets?

A. You mean before or after reacquisition of the plant?

Q. This is before reacquisition, is it not?

A. That is correct. That is the machinery which we purchased.

Q. During the time that you leased? [1104]

(Testimony of Nicholas J. Winckler.)

A. That is correct.

Q. And that is all that is included in those fixed assets?

A. No. The original plant is not included.

Q. Because the original plant was owned by another person?

A. Owned by the lessor, correct.

Q. Right. Now, the lease and your option to repurchase is shown on this balance sheet as having $1.00 value. A. A nominal value of $1.00.

Q. That is what it shows, isn't it?

A. Yes. Regular accounting practice. Counsel, please, may I——

The Court: What is your request?

The Witness: There is a very important part of that report where the fixed assets are stated by Hodge and Company explaining that $1.00 repurchase amount that counsel failed to mention.

The Court: Well, we can go into that later.

Q. (By Mr. Strachan): Now, following January 31, the company exercised its option to repurchase from the lessor, is that correct?

A. That is correct.

Q. And when the lessor purchased those assets, it gave $50 in cash and assumed certain liabilities, is that correct, [1105] which were liens against the property, including the RFC mortgage?

The Court: $50,000, counsel.

The Witness: You say $50?

Mr. Strachan: $50,000. Pardon me.

Q. Gave $50,000 in cash. A. Who did?

(Testimony of Nicholas J. Winckler.)

Q. The purchaser at the reorganization sale when you sold these assets. A. Correct.

Q. And the additional purchase price consisted of an assumption of the RFC mortgage and other liens? A. Approximately $90,000.

Q. Yes. A. Correct.

Q. When you exercised the repurchase agreement, you assumed certain liabilities, which included the RFC mortgage and other liens, didn't you?

A. According to my best recollection, we assumed only one lien, the RFC.

Q. All right. In addition to that, you paid in cash $17,000 and issued preferred stock for about $133,000 to make up the balance of the $150,000 option price? A. When we repurchased it.

Q. Yes, sir. [1106] A. That is correct.

Q. That was after this January 31 balance sheet that I just showed you, that you reacquired the property? A. Yes.

Q. Now, when that property was reacquired and was put back on the balance sheet of the corporation, the assets taken back from Rubin were again written up by appraisal, were they not?

A. May I explain the transaction, your Honor? I think it would save time.

Q. That calls for a yes or no answer.

The Court: First see if you can answer the question. The question is, were the assets written up—I don't know, probably you and the witness understand this, but——

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): They were not put on the books at $150,000, were they?

A. Yes and no.

The Court: All right, now, explain your answer.

The Witness: According to our tax returns, we have to keep the value of our assets exactly in the amount that we acquired them or reacquired them. So we had actually two evaluations. The one was the base to make the federal income tax returns. If we purchase something for $100, we had to put it in for $100, and we took always the maximum depreciation allowable under the federal law. [1107]

On the other hand, when we kept our books according to realistic value, which was completely apart, for how much we purchased or repurchased it, then we kept a separate set of the inventory of such fixed assets, which were stated at the realistic appraised value, and we have appraisals made, as I testified before, by a bonded appraisal company periodically, and that we sold Mr. Rubin and his associates the plant for $50,000, which was a distress sale, had nothing to do with the realistic or actual value of the plant, because it was just putting in the pawn shop a diamond ring for $100 which was worth a thousand dollars, and as long as you can get back the diamond ring for $100 plus interest, we are not interested in the price. [1108]

The Court: All right. Now, I understand that. But now, tell us what you did.

Q. (By Mr. Strachan): After you paid $150,000 for Rubin's interest in the property, you did not

(Testimony of Nicholas J. Winckler.)

set up $150,000 as the cost of those fixed assets, did you? A. According to our tax return we did.

Q. Did you according to your balance sheet?

A. According to our balance sheet we took the actual realistic appraised value, less depreciation, according to good accounting practices.

The Court: Let me ask a question.

Mr. Strachan: Surely.

The Court: When you repurchased from Rubin and set it up, as you say, realistically, did you then take the same values, less depreciation, at which you had previously carried this property?

The Witness: In a sense yes, your Honor.

If you recall, I testified that we made an appraisal in 1946. Then between 1946 and 1951, over a period of five years, we made substantial improvements in the real estate, and also acquired substantial additional equipment. So in 1950, and also in 1951, we had the property reappraised, which was a continuation of the 1946 appraisal, just bringing it up to date.

The Court: All right. But you used, upon the repurchase [1109] of the property from Rubin, for the purpose of what you refer to as your realistic appraisal—I don't know what the bookkeeping term would be—did you use, generally, the same base that you had used prior to the sale?

The Witness: I am sorry, your Honor, I don't understand exactly the question. I don't follow the question.

The Court: You know what I am trying to find

(Testimony of Nicholas J. Winckler.)

out, counsel. Do you want to pursue it, or do you want me to?

Mr. Strachan: The fact is they didn't. They got a new appraisal, which was dated January 12, 1951.

Mr. Dixon: I think the picture is somewhat beclouded by the fact that it isn't made clear to the jury that there are two appraisals here.

Mr. Strachan: That is what the judge is trying to get at.

Mr. Dixon: One in '46, I understand, and another one about '49 or '50.

The Witness: That is correct.

Mr. Dixon: And the valuations would be obviously higher or lower in both of them.

The Court: Let me see if I understand this.

You had an appraisal in '46, to start with?

The Witness: Correct.

The Court: Then did you get some reappraisals from time to time?

The Witness: We had a reappraisal in 1950, four years [1110] later.

The Court: Did you have a reappraisal, then, early in '51?

The Witness: We had a reappraisal in '51.

The Court: And the reappraisal in '51, then, was the basis upon which you set up what you speak of as the realistic value of the plant?

The Witness: That is correct. But at the same time, when we filed our tax returns we had to figure the value of the plant for the $150,000 that we reacquired it from Rubin, plus $50,000 RFC loan,

(Testimony of Nicholas J. Winckler.)

which makes two hundred, plus approximately $100,000 additional equipment that we put in ourselves during the period that the corporation operated the plant as a lessee. Consequently, our tax return will show a plant evaluation of approximately $300,000, which is based on the reacquisition price, while the so-called realistic price will show the appraised value, less depreciation.

The Court: All right. Let's go ahead.

Q. (By Mr. Strachan): Isn't it a fact that three months after you reacquired, three or four months after you reacquired these assets from Rubin for $150,000, part in stock and part in cash, you showed fixed assets as of the end of July 31, 1951, of $721,000?

A. Well, that is correct. That is just what I explained. It is based on the appraisal. [1111]

Q. That appraisal was dated January 12, 1951, wasn't it?

A. The appraisal was a continuation of the previous——

The Court: Now, wait. Start back again. Listen to the question and answer the question. Then if you want to explain you may do so.

He asked you now the date of this appraisal, whether it was January 12, 1951.

The Witness: The answer is no, but it needs some explanation.

The Court: All right.

The Witness: Our first——

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: There is no question pending. He said, "The answer is no."

The Court: He may explain it, counsel. Everything in this world is not black or white.

The Witness: The last complete appraisal that was made item by item was, I think, 68 pages, it was made in 1950. Between 1950 and 1951, I believe we acquired additional $16,800 worth of equipment. I took that from a photostatic copy from our counsel. Exactly $16,740 worth of equipment. In spring or winter, 1951, we were ready to file an application to the Division of Corporations of the State of California to issue securities, as it was discussed before.

The Court: Let's stick to the particular [1112] problem.

The Witness: Yes, your Honor. What I try to say is that the Corporation Commissioner demanded an up-to-date appraisal. The Corporation Commissioner was not satisfied with the 1950 appraisal. The appraisal is a very expensive thing. So we settled with the Division of Corporations that we will make an amendment to our 1950 appraisal. And that amendment is in one letter which I would not call an appraisal. That one letter includes only addition in machinery and equipment totaling $16,740, plus a correction in the general value, due to the increasing prices since the Korean War, which was not taken into consideration, of approximately 8 per cent. And that appraisal resulted in a gross amount of $732,000, from which amount our accountant took a depreciation for a period of six months, or something

(Testimony of Nicholas J. Winckler.)

like that, and that depreciation figure brought the $732,000 down to the $721,000 that counsel mentioned.

The Court: All right. Now, let's get back. This letter which you refer to as an amendment, one-page letter——

The Witness: Correct.

The Court: ——was that dated on or about January 12, 1951?

The Witness: I believe so.

Mr. Dixon: We have it. This is the appraisal we were discussing yesterday, your Honor, and it is available to counsel or the court. [1113]

The Court: All right.

The Clerk: I have marked Defendants' Exhibit C for identification, your Honor.

The Court: Exhibit C marked.

(The exhibit referred to was marked Defendants' Exhibit C for identification.)

* * *

Q. (By Mr. Strachan): So that having started with sixty some thousand fixed assets before buying the plant and equipment from Rubin, you paid him $150,000 for the plant and equipment, and you then have seven hundred twenty some thousand of fixed assets by July 31st of 1951, isn't that a fact?

A. Well, counsel, I think I explained the situation. I don't think I have to add anything to it.

Q. Well, that is the fact, isn't it?

A. The value of the plant was always the same,

(Testimony of Nicholas J. Winckler.)

regardless [1114] how it was footballed around between buyer and seller.

Q. (By Mr. Strachan): Well, now, the Judge asked whether you took the same values on land and buildings after reacquiring the assets that those assets had at the time you sold them to Rubin.

A. No, because I didn't sell to Rubin—we didn't sell to Rubin the assets at its realistic value. That was a forced sale on a reorganization.

Q. You mean you sold the assets for less than they were worth?

A. Oh, considerably. Twenty cents on the dollar. May I explain again something?

The Court: No.

Q. (By Mr. Strachan): Did Mr. Rubin, when he sold those assets back to you, sell them back to you at twenty cents on the dollar?

A. He probably sold them back at thirty cents on the dollar or thirty-five cents on the dollar. He made a profit.

Q. He sold the assets worth approximately $600,000 for $150,000, partly cash and partly stock, is that right?

A. 150,000 plus, 200,000. Assets were sold for $200,000, that is correct.

Q. By Rubin to the corporation?

A. That is correct.

Q. Now, you continued to own the plant until some time in the spring of 1952, when it was sold, with the approval of [1115] this court, is that correct? A. That is correct.

(Testimony of Nicholas J. Winckler.)

Q. As at the end of your fiscal year ending January 31, 1951, which was shortly prior to the sale, forced sale, by this court, in 1952, the assets were still carried, the fixed assets were carried at approximately $700,000? A. That is correct.

Q. Pursuant to the order of this Court, those fixed assets——

The Court: Now, just a minute, counsel. Are you proposing to go into the sale that occurred after the adjudication in bankruptcy by this court or during the bankruptcy proceedings?

Mr. Strachan: During the bankruptcy proceedings.

The Court: For what purpose?

Mr. Strachan: To show what the real value of those assets was.

The Court: It is your contention that a bankruptcy sale is evidence of real value?

Mr. Strachan: It may be a forced sale, but I think we are entitled to show, your Honor, what was realized for the bankrupt's interest in those assets.

The Court: I will hear you on that at recess before we go into it.

Mr. Strachan: I will suspend this line of examination [1116] until the ruling.

The Court: Do you have other questions you can ask?

Mr. Strachan: Yes, sir.

The Court: All right.

Q. (By Mr. Strachan): Remember, Mr. Winckler, yesterday you mentioned——

(Testimony of Nicholas J. Winckler.)

The Court: Well, we will take a recess probably about 10:30, so maybe we could take it now and discuss this.

Mr. Strachan: This is a very short subject.

The Court: All right.

Q. (By Mr. Strachan): Remember that yesterday you mentioned that in 1948, when the corporation was being operated by a receiver pending the attempt to work out an adjustment, that there were dealings between the receiver and Exchange Orange Products Company. Do you recall having referred to that?

A. If I recall correctly, I stated yesterday that not the receiver, but I negotiated the deal in behalf of our corporation with Mr. Finley, and after the deal was made between Mr. Finley and our corporation and reduced to writing, then the corporation being under Chapter 11 in the receivership, the receiver had to enter into a formal agreement with Sunkist or, rather, Exchange Orange Products to carry out the agreement. But I made all the arrangements prior to that agreement. [1117]

Q. But the contract under which fruit was supplied for the purpose of carrying out the government contract was an agreement to supply to the receiver, isn't that the fact?

A. Well, I am not very well qualified to answer that, because there are two agreements, one between the corporation and Mr. Finley and one between the receiver and Mr. Finley, and I think that the written agreement should be self-explanatory.

(Testimony of Nicholas J. Winckler.)

The Court: Why should we spend time on this when we can agree on the legal situation, what it was?

Mr. Strachan: I would be very glad to stipulate.

The Court: My recollection is—I happened to have had the case—my recollection is that there was an application that the debtor remain in possession pending the filing of the Chapter 10 proceeding. Is that right?

Mr. Fisher: Your Honor, this refers to the Chapter 11 proceedings in 1948, not Chapter 10.

The Court: Oh, you are talking about the 1948 proceeding?

Mr. Fisher: Yes.

The Court: I know nothing about that. I'm sorry. Go ahead. Maybe we can work out some stipulation as to the Chapter 10 situation if that becomes important.

The Clerk: I have marked Defendants' Exhibit D for identification. [1118]

The Court: D for identification.

(The exhibit referred to was marked as Defendants' Exhibit D for identification.)

Q. (By Mr. Strachan): I show you the document, Mr. Winckler, that has been marked Defendants' Exhibit D, which purports to be an agreement entered into the 27th of August, 1948, by and between E. A. Lynch, Receiver for Winckler & Smith Citrus Products Company, and the Exchange

(Testimony of Nicholas J. Winckler.)

Orange Products Company, and ask you if you have ever seen that agreement before.

A. Yes, I did.

Q. Is that the agreement under which the fruit was supplied for the performance of the government contract? A. There were two agreements.

Q. Is that the agreement——

A. That's right, one of the two agreements.

Q. Is that the agreement, is that an agreement under which the fruit was supplied?

A. I answered already, counsel. It is one of two agreements.

Q. Will you name the other agreement?

A. The other agreement is a letter agreement exchanged between Mr. Finley, Exchange Orange Products, addressed to me as president of the corporation, and I don't know—our counsel has the letter. I don't know the date. [1119]

* * *

The Court: All right. It will be marked D-1 for identification. If later the plaintiff offers it, we will give it a plaintiff's number.

The Clerk: D-1.

(The document referred to was marked Defendants' Exhibit D-1 for identification.)

The Court: What is the date of the letter?

The Clerk: August 19, 1948.

The Court: Proceed.

The Clerk: I have also marked Defendants' Exhibit E, your Honor.

(Testimony of Nicholas J. Winckler.)

The Court: Exhibit E marked.

(The exhibit referred to was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Strachan): I show you, Mr. Winckler, Exhibit E, which is a photostatic copy of a letter dated October 29, 1948, addressed to the Exchange Orange Products Company, signed by E. A. Lynch, Receiver, and ask you if you have ever seen that letter before.

A. No, I have not. But I accept it because I know Mr. [1121] Lynch's signature.

The Court: Just answer the question. The question is, have you seen the letter?

The Witness: No.

The Court: The answer is no. All right.

Q. (By Mr. Strachan): I think you testified yesterday you didn't authorize the receiver to write a letter.

A. I had no authority to tell the receiver what to do.

* * *

The Court: The jury is now absent. Now, I understand the defendants are going to offer evidence of the present bankruptcy proceedings and what the physical properties of the corporation sold for.

Mr. Strachan: Yes.

The Court: This comes as a—it startles me. Maybe it is proper. I didn't hear any objection from Mr. Dixon, but it doesn't seem to me that what a property would bring in [1122] bankruptcy—I was

(Testimony of Nicholas J. Winckler.)

going to say is any evidence, but maybe it is some evidence of what its market value is.

What is your view on this, Mr. Dixon? [1123]

Mr. Dixon: Well, your Honor, I have really no objection, as your Honor has suggested, to that part of the record of this court going into the record in this case, because from our point of view it shows what ultimately happened to the plant.

The Court: If you both agree, all right.

The fact startled me, that there was going to be this evidence offered. But if that is what you both want, then I suppose you both claim it has some probative value for something or other.

Mr. Dixon: May I say this, further, your Honor? It seems to me that the sale price may have some value as indicating the price at which the property was, in fact, sold as a forced sale.

I don't think it necessarily reflects the true value, but it does reflect the value where there is no purchaser, shall we say, for a restricted product.

The jury may consider that as evidence of true value, or not. I am frank to say I don't know what the jury would do with that.

But as far as the fact of sale is concerned, the plaintiff has no objection to the introduction of that evidence.

The Court: Just a minute. I understand that you have no objection to the fact of sale, that you probably will want to prove that. That is not what was worrying me. What was [1124] worrying me was these figures of the sale.

(Testimony of Nicholas J. Winckler.)

What is your view, Mr. Strachan, as to the admissibility and probative value of the sale in bankruptcy?

Mr. Strachan: Did you address a question to me, your Honor?

The Court: Yes. I probably was sitting down here and my voice was hitting this bench and not getting over the top.

I say, what is your view as to the probative value of the sale price of the property in bankruptcy? That is, the sale price as contrasted with the fact that there was a sale in bankruptcy, alone.

Mr. Strachan: I would say this, your Honor: That a sale at public vendue of assets presumably brings the worth of those assets.

In this case I believe there was an appraisal made to advise the court of the particular value of the fixed assets that were offered for sale, and the court sold, subject to encumbrances, the right, title and interest of the——

The Court: Maybe I am thinking of condemnation cases. In condemnation cases where the question is what was the fair market value as of the date of taking, the court wouldn't even let into evidence testimony of what a certain piece of property sold at a bankruptcy sale. Nor would the court ordinarily let into evidence the price at which the Government compromised and paid off—— [1125]

Mr. Strachan: A compromise, I would agree.

The Court: Maybe I am just thinking of those

(Testimony of Nicholas J. Winckler.)

cases and the rather strict rule in condemnation cases that wouldn't permit such value.

Of course the two of you are looking at it from different standpoints. Mr. Dixon wants it in because it shows there was a bankruptcy sale, and therefore he doesn't care what the value was. You are not concerned with the fact that there was a bankruptcy sale. You want to use the sale price as evidence of the value of the assets. Is that right?

Mr. Strachan: That is right.

The Court: Your purposes are divergent.

Well, if both sides think they can make something out of it, and one offers it and the other doesn't object, I am not going to keep it out, although I have serious doubt about it. It sort of affronts my concept of how you prove value, to use a bankruptcy sale for the purpose of value.

Mr. Dixon: Of course, as I have stated before, your Honor, I have no objection to the introduction of the fact of sale into the record, because I intended to put it in as part of the plaintiff's case through the trustee. I understand that Mr. Strachan intends to introduce the amount received from the sale as apparently the value at the time of the sale of the property sold.

Of course it was the price at which the property was [1126] sold. That is not in dispute. It is, however, a forced sale.

The jury might take that into consideration if value is of import, and it probably may well be in this case, as one of the factors in determining the true value of the property.

(Testimony of Nicholas J. Winckler.)

But I quite agree, and I think counsel must agree, also, that the real value—value is always an intangible thing—cannot be determined in toto by the value or the price acquired at a forced bankruptcy sale.

The Court: I will permit you to proceed on that basis. Mr. Dixon, if you are going to go any further than the mere stipulation of showing that there was the loss of the property in bankruptcy, then I suppose we have to go all the way and go into the question of value.

But it may be proper to handle the matter by an instruction on what is fair market value.

You are all familiar with the general instruction sort of to the effect that fair market value of property is that which a willing seller who didn't have to sell would sell for, and a willing purchaser who didn't have to purchase would pay, and a few other things thrown in.

Mr. Stark.

Mr. Stark: If I may, I believe you are stating the value rule in condemnation actions, which allow you to assume that at a particular time there is a willing buyer, where property is being taken involuntarily. But what we are dealing with [1127] here is a particular buyer for a voluntary sale.

The Court: We will cross those bridges when we get to them, but I will permit you to proceed.

I don't know that I quite get your suggestion, Mr. Stark. I want to understand it. Do you mean there would be a different rule as to fair market value in this case than in a condemnation case?

(Testimony of Nicholas J. Winckler.)

Mr. Stark: I am not sure—I don't want to labor the point, but I am not sure that we are dealing with fair market value in a condemnation sense. In a condemnation sense you take somebody's property as of now, because you want it, and they are entitled to find the highest use and the highest value if they can wait for a buyer.

The Court: But the defendants' position, if I understand it, is this: that Winckler & Smith's statement of values are phony, that they have inflated and written up their values, and they claim that they had a business with fixed assets of $300,000 or more —I am just taking some arbitrary figures—and they claim they were damaged. Now, let's for argument say, "Ladies and gentlemen of the jury, lay aside the question of damage, that is, whether damage occurred, and proceed for argument to say that it did, what was the damage? This company's assets had no value, it was sold in a bankruptcy sale in Federal Court for $100 over and above the amount of the "RFC loan"—I think that was the amount of the sale—"[1128] "therefore, actually it had a $100 value, that is what their whole plant was worth, $100."

In other words, what you propose to do, and of course you are entitled to make this argument—I am talking now about whether certain evidence is admissible to base it on—what you are doing then is saying what was the value of this plant and this business which plaintiffs say we hurt or destroyed.

So it seems to me, in theory, that generally fair

(Testimony of Nicholas J. Winckler.)

market value is involved, although there may well be involved the subsidiary problem of whether you could have found a purchaser for this business. That, therefore, it was the type of business which had one value in one sense, but when you came to sell it maybe you couldn't find anybody who would ever buy it, which would be a factor in what it was worth.

Maybe this will clear the air for some later determination of what is the law on it.

We will take a short recess.

(Recess taken.) [1129]

The Court: Let the record show the jury present.

Proceed.

Q. (By Mr. Strachan): Mr. Winckler, yesterday—no, I guess it was the day before yesterday—in any event, on direct examination you mentioned that you made various efforts to get credit with which to refinance the RFC mortgage. You mentioned the Bank of America at Anaheim.

A. Correct.

Q. What other efforts did you make to get refinancing?

A. I had a broker contact a couple insurance companies. Then I contacted some private lenders and they all turned us down, and mainly for two——

Q. They all turned you down?

A. For two reasons.

Q. All right.

(Testimony of Nicholas J. Winckler.)

A. Are you interested in the reasons? I mean I don't want to volunteer.

Q. Is that all of the efforts that you made to get refinancing?

A. Well, bank, private lenders, insurance companies—that's all—including our own stockholders.

Q. Would that include Rubin?

A. Yes, mainly Rubin.

Q. What was the amount of that loan at that time?

A. Only $50,000, probably $51,000. [1130]

Q. In addition to trying to refinance that $50,000 mortgage, did you at any time before the properties were sold under the authority of this court, try to find a buyer for the properties? I am talking now about the plant and equipment.

A. You mean before or after the reorganization?

Q. Before the sale in 1951—no, 1952.

Mr. Dixon: If the court please, this property wasn't sold in 1952. Counsel is in error.

The Court: What was the date?

Mr. Strachan: 1954.

The Witness: No, 1953. January, 1953.

The Court: The sale?

The Witness: The court sale, I am referring to the court sale.

Mr. Dixon: It was 1954, your Honor.

The Witness: January, 1953, two years ago.

The Court: Wait just a minute. Who has the date? Well, the date isn't filled in, but the order approving the sale was made in—well, this copy shows

(Testimony of Nicholas J. Winckler.)

February, 1954. The date isn't filled in. What is the date?

Mr. Fisher: The order confirming the sale, and by the way that order was made by Referee Head, was on February 5, 1954.

Mr. Strachan: Can we have that as the stipulated date?

Mr. Dixon: Why, surely. [1131]

The Court: All right.

Q. (By Mr. Strachan): During the period from the fall of 1951, until the sale of the property that was confirmed by this court in February of 1954——

The Court: Now, wait, wait. You will have to rephrase that question, counsel, because of the history of this current bankruptcy.

What I am referring to is the fact that there was, first, the debtor proceeding and then there was an adjudication. Now, during the debtor proceeding your question would be proper. After the adjudication I don't think that period is proper.

Mr. Strachan: I don't understand that there was an adjudication, your Honor. Mr. Fisher is more familiar than I am with that.

The Court: Wasn't there an adjudication?

Mr. Fisher: May the court please, perhaps I can be of assistance.

The Chapter 10 proceedings, a petition was filed March 19th in 1952. Mr. Walker was appointed the trustee. The petition was filed under the Chapter 10 proceedings and proceeded under those proceedings.

(Testimony of Nicholas J. Winckler.)

and there has never been an adjudication of bankruptcy, itself.

The Court: Is that correct?

Mr. Irwin: That is correct, your Honor.

The Court: I thought there had been an adjudication. [1132] I thought that I had so ordered.

Mr. Fisher: Perhaps this further explanation, then, is in order.

The Court: All right.

Mr. Fisher. In Chapter 10 proceedings, looking towards reorganization, they continue in Chapter 10 until there has been a finding of insolvency and an adjudication of bankruptcy, itself, and if there is such an adjudication, then a trustee in bankruptcy is appointed and they proceed, then, as an ordinary bankruptcy proceeding. In these Chapter 10 proceedings——

The Court: And the Chapter 10 proceeds until there is such an adjudication?

Mr. Fisher: Yes.

The Court: And there has not been one?

Mr. Fisher: There has not been one.

The Court: I stand corrected, then.

Mr. Fisher: Perhaps, too, this will clarify it. I have a summary, though we do have the order itself. There was a return of sale by the trustee and a petition for confirmation of the sale filed on February 2, 1954, and on the same date Referee Head made an order confirming the sale, and that confirmed the sale by the trustee to Allen A. Rubin for the sum of $100. The said Allen A. Rubin being the highest bid-

(Testimony of Nicholas J. Winckler.)

der, therefore, of all of the right, title and [1133] interest of the debtor in and to all of the real and personal property of the debtor, except only the debtor's right to the use of the trade-mark Anagold, subject to all liens and encumbrances of every kind and character thereon, which said real and personal property is described as follows, and then follows the description. All of the personal property of the debtor located at and or adjacent to said real property.

And there was the sale of the Anagold trade-mark to the Muscat Co-operative Winery, and that was for $1,000.

The Court: One other thing: At the time of the sale the real property and the physical fixtures appurtenant thereto were encumbered by the RFC loan?

Mr. Fisher: That is correct.

The Court: Was there also a chattel mortgage on equipment?

Mr. Irwin: Yes, your Honor. In the RFC matter there was a deed of trust covering the real property, and a chattel mortgage covering the equipment.

The Court: Which both ran to the RFC?

Mr. Irwin: Both ran to the RFC.

The Court: The RFC had encumbrances on substantially all of the real and personal property?

Mr. Irwin: That is true.

Mr. Fisher: There was also a second deed of trust to, I believe, Rubin and Parwin. [1134]

Mr. Irwin: To be technical, it was in favor of

(Testimony of Nicholas J. Winckler.)

Parwin. And the second deed of trust and second chattel mortgage covered the entire equipment, subject to the RFC deed of trust. [1135]

The Court: What was the amount of the obligation on the 2nd?

Mr. Irwin: $57,500.

The Court: Now, can we accept these facts as being stipulated to so that the jury may consider them as facts?

Mr. Strachan: I can.

Mr. Fisher: So stipulated.

Mr. Irwin: So stipulated.

The Court: Thank you for straightening me out, Mr. Fisher. I have lived with these proceedings and I thought I knew what had happened, but I am wrong. Your question is entirely proper then, Mr. Strachan.

Mr. Irwin: May I say one thing further, your Honor? In connection with the adjudication of the bankruptcy, there was an application during Chapter 10 proceedings to have the debtor, Winckler & Smith, adjudicated a bankrupt. I believe that was in the latter part of 1952 or the early part of 1953. But my remembrance is that the court held that a reorganization by liquidation was proper in the Chapter 10 proceeding. Therefore an adjudication was denied and the plan of reorganization by liquidation was approved.

The Court: I recall. Now you have straightened me out. Thank you.

Mr. Irwin: The trustee then proceeded to carry through the liquidation, and it was pursuant to that

(Testimony of Nicholas J. Winckler.)

proceeding that [1136] the trustee then negotiated the sale which has been referred to and which was approved by Referee Head and by this court.

The Court: That also may be considered part of the facts?

Mr. Fisher: Yes. I am sure it is correct, although I had forgotten that fact.

The Court: I stopped you because I remembered erroneously there had been an adjudication and therefore I was going to make you ask a question up to the date of the adjudication, at which time, of course, the corporation's interest would terminate.

Now you may proceed, Mr. Strachan.

Q. (By Mr. Strachan): What, if any, efforts to find a buyer for the plant or any of its assets did you make between the fall of 1951 and the spring of 1954?

A. Both the trustee, Mr. Walker, as well as myself, did everything possible to find a buyer who would purchase the plant on reasonable terms and at a reasonable price. But we were turned down by everybody in the industry, as well as outside of the citrus industry, for one reason, that they said a plant which was built for the purpose of producing citrus juices and which is unable to supply oranges, or oranges at competitive prices, is of no value. It is just a hotel where you couldn't rent rooms.

Q. Would you name the persons that you know were contacted [1137] with a view to finding a buyer?

A. Well, Mr. Walker when he testifies, I am

(Testimony of Nicholas J. Winckler.)

quite sure he is going to name the people that he testified. I advertised the property and I am not prepared to list the names of all the people, but I negotiated with dozens of people who were not interested to enter the citrus industry under this condition.

Q. Would you name one person that you contacted?

A. Well, Mr. Walker talked to the Silzle Corporation. I talked to a man called Oscar Rudnick, who is a big cattleman and who had some interest at this time in the citrus industry, and was known to be a very wealthy individual, and if counsel so desires, I can give an exact list of names tomorrow. You said to mention one, so I mention Rudnick.

Q. Do you know where he is now?

A. Oh, yes. He lives and has been living for the last 35 years in Bakersfield, California.

Q. Will you name another that you contacted with a view to sale?

A. I just throwed away last week a dozen cards that I carried in my pocket. There was a retired Louisiana Chevrolet dealer who wanted to buy. Instead he bought himself a bank in Pasadena.

Q. What was his name?

A. That is what I am trying to think of. I would greatly [1138] appreciate if you would let me give you those names tomorrow, because it would be precise and I could supply names and addresses, and so on.

(Testimony of Nicholas J. Winckler.)

Q. That will be satisfactory.

A. I will be very glad to do so.

Q. What advertising did you do in your efforts to sell the property?

A. Well, I advertised in the leading newspapers, such as the Los Angeles Times.

Q. Can you fix the date of your advertising?

A. Well, I think I can probably dig up at home the actual ads.

Q. Will you refresh your recollection and bring any material that will refresh your recollection on that subject?

A. I am very happy to do so.

Q. Now, in regard to the people from whom you sought credit to refinance the mortgage, you said you contacted two insurance companies. Will you name those companies?

A. I said that I had a broker contact these insurance companies.

Q. What is the name of that broker?

A. A certain Mr. Graef, G-r-a-e-f, doing business as California Properties, Inc.

Q. Where does he do business?

A. In Los Angeles. [1139]

Q. Is he still doing business here?

A. Yes. Now it just comes to me. I contacted certain people in New York. Among others, I contacted the Blair Holding Corporation, which is a subsidiary of the Bank of America. The reason for contacting the Blair Holding Corporation was that they owned substantial interest in the Lucky Market

(Testimony of Nicholas J. Winckler.)

Chain. That is a big super-market chain in Northern California, around San Francisco.

Q. Whom did you contact within that organization?

A. In that organization I had contact with a certain Mr. Truman, and then also I had direct contact with the president, he was president at that time of the Blair Holding Corporation, Virgil Dardi, D-a-r-d-i, if I remember correctly.

I also had a contact with the California associates, which is the first——

Q. Just a minute, before you go to that. The Blair Holding Company which you contacted were in New York. Were both of their representatives that you contacted in New York, too?

A. They were both in the New York office, but they maintained offices in San Francisco.

Q. Did you contact them in San Francisco?

A. No. I contacted the New York office.

Q. Then you said you contacted another organization [1140] when I interrupted you.

A. The First California Corporation.

The Court: You said California Associates. Is that the same thing?

The Witness: No. California Properties. That is a one-man outfit who is really a business opportunity broker.

The Court: California Associates?

The Witness: No. They call themselves California Properties, Inc. The owner of this corporation is a certain Mr. Graef. [1141]

(Testimony of Nicholas J. Winckler.)

Q. Where does he live?

A. He has his office at the Commercial Exchange Building on West Eighth Street here in Los Angeles.

Now, the First California Corporation that I contacted is a large investment banking house, and the president of the First California Corporation, which has probably 24 offices all over Southern California, happened to be a director on the Blair Holding Corporation's board, and the reason I conducted these negotiations in New York was because they had at this time their annual stockholders meeting, and Mr. Evans happened to be in New York at this time, and Mr. Evans was the one who suggested that we meet in New York and discuss the matter with Mr. Dardi, the president of Blair Holding Corporation.

Q. When I interrupted you a few moments ago I think you mentioned, as the judge remarked, an organization known as California Associates. Did you contact California Associates?

A. California Properties, Incorporated; not California Associates.

Q. I see.

The Court: He explained that that was Graef's organization on West Eighth.

Mr. Strachan: I wanted to make sure that those were the same, if that is the fact.

Q. (By Mr. Strachan): You know the one who bought the [1142] assets of the corporation in February or March, 1954, to be Mr. Rubin, do you not?

(Testimony of Nicholas J. Winckler.)

A. Well, technically speaking, one of the Mr. Rubins acted as buyer, but the way I was told, the sale was financed by Mr. Rubin and by Mr. Parwin, jointly, in order to protect their second trust deed, and they had to pay off the RFC in the amount of $56,000 or $55,000, something like that, in cash.

Q. That is the same Mr. Rubin that you have mentioned before, isn't it, who was an officer and director?

A. There are two Mr. Rubins. Mr. Maxwell L. Rubin is the one who was an officer and a director of our corporation. He has a brother called Allen Rubin, who is running his law office in Chicago. Sort of the office manager of the law office. I understand they have about 12 attorneys in the law office. And Mr. Rubin is more interested in various business enterprises than running his law office, so he leaves that to his brother.

The Court: Which Mr. Rubin was the buyer?

The Witness: Allen Rubin was the buyer.

The Court: The attorney?

The Witness: Both are attorneys.

The Court: Then Allen Rubin, the lawyer you have just described that was the office manager?

The Witness: The property was acquired in his name, [1143] and I understand he is holding it in trust for Maxwell L. Rubin, his brother, and for Albert Parwin, who is a furniture manufacturer.

Q. (By Mr. Strachan): The last time you knew about the ownership of the building he still owned it in that way?

(Testimony of Nicholas J. Winckler.)

A. Do you mean at the present?

Q. Yes.

A. I know definitely that they do.

Q. Do you have any present interest in the plant?

A. Well, I have one interest. They are very anxious to sell it, and I am still trying to sell the plant, and if I sell it I probably will make a commission. That is my only interest that I have. I have no ownership in the plant.

Q. How long have you been trying to sell the property for the Rubins?

A. I would say for the last year.

Q. Is the property being used for anything now? A. No, it is not.

Q. Has it been at any time since it was sold to the Rubins? A. It is not.

Q. I believe you testified, Mr. Winckler, on your direct examination, that until the year in which you went out of business you had a highly profitable organization in Winckler & Smith Citrus Products Company, is that correct? [1144]

A. Until the day I went out of business?

Q. Until the time—no. I said until the year when you went out of business. A. Correct.

Q. Now, as a matter of fact, during the entire period of operation this business never paid a Federal income tax, did it?

A. Well, that is not so.

Q. In what year was a Federal income tax paid?

(Testimony of Nicholas J. Winckler.)

A. The first year when we operated as a partnership till December 31st we made $95,000 net profit as a partnership for six months' operation. Then we adopted a fiscal year of January 31st—I mean from February 1st to January 31st. During the month of January we discarded a lot of old equipment. As I stated, we invested year after year machinery into the plant. And we paid in 1946 income tax for the fiscal year ending—pardon me—we paid income tax in 1947 for the fiscal year ending January 31st, 1946.

Q. What you are referring to there is the partnership operation, is it not?

A. It was the predecessor of Winckler & Smith Citrus Products Company.

Q. But when you are operating as a partnership, the business doesn't pay the income tax, it is the partners, isn't that a fact? [1145]

A. That is correct.

Q. All right. Now, Winckler & Smith company never paid an income tax, isn't that true?

A. Well, that needs some explanation.

Q. Well, is it or isn't it true?

A. Well, I wouldn't be able to state it without seeing the income tax returns.

Q. Can you as you sit there now tell us of any year in which Winckler & Smith company paid a Federal income tax? A. I cannot.

Q. Isn't it a fact that it never paid an income tax?

A. You probably are right, but I can't make a

(Testimony of Nicholas J. Winckler.)

definite statement without seeing the income tax returns.

The Court: Are they available?

Mr. Dixon: I think some of them are, your Honor. We are perfectly glad to say. The answer to the question is obvious. We will bring it out through our accountant.

The Court: All right. The returns are available, that is all I wanted to know.

Q. (By Mr. Strachan): As I recall your previous testimony, the corporation took over the assets from the partnership, and among the assets taken over were the earnings of the partnership business—— A. Correct.

Q. ——that had not been distributed to the partners? [1146] A. That is correct.

Q. That was $29,000 of profit?

A. Plus the other assets owned by the partnership.

Q. But the undistributed earnings of the partnership amounting to $29,000 was included in the assets?

A. Well, I could not verify the $29,000 figure without seeing the financial statement. [1147]

The Court: Has this sheet been marked before?

Mr. Strachan: I believe so.

Q. I show you Defendants' Exhibit A-1. I call attention to the tabulation at the bottom. I call attention to the fact that it shows that——

A. Total assets of $240,000.

Q. That is the way it shows there. So that it

(Testimony of Nicholas J. Winckler.)

shows that there was $38,000 of earnings and about $10,000 withdrawn, leaving a net of $29,000 in the business.

A. The total earnings are approximately $38,897, according to this financial statement. It is not 29,000.

Q. But it also shows, doesn't it, drawings of $10,200? A. Oh, yes.

Q. So that means that there was $29,000 profit left in the business when the corporation took it over?

A. $29,000 profit, including assets, making a total of $240,000.

Q. That is what it states there?

A. That is correct. I think it is substantial.

Q. It is a fact, isn't it, for the year ended January 31, 1947, which was the first year under corporate operation, there was a loss of $11,700 on the year's total operation?

A. Well, I recall these figures.

Q. In addition to that, in the same year, you reduced [1148] your inventory value by 48,000, do you recall that?

A. Well, I don't recall the $48,000 figure, but I would make the statement I didn't reduce it.

Q. It was reduced?

A. Circumstances reduced it. That was the year of the big crash in the citrus business.

Q. But in any event you weren't able to sell your inventory at prices that were commensurate with the prices at which the inventory showed on

(Testimony of Nicholas J. Winckler.)

your books, so you reduced the book value of the inventory by 48,000, didn't you?

The Witness: May I have the court's permission to explain that in a few simple words?

The Court: First answer the question. Did you reduce the inventory, the bookkeeping entry that is?

The Witness: That is correct.

The Court: That is, did your corporation reduce the amount shown on inventory by an entry of some sort?

The Witness: That is correct.

The Court: Now explain it.

The Witness: In 1946, the citrus industry, I am referring to the canned citrus juices—frozen citrus juices at that time were not existent for practical purposes—suffered a terrific setback. That goes for Florida and California alike. It is known that probably 18 or 20 plants in Florida and California ceased to operate, went into bankruptcy [1149] or liquidated.

Orange juice sold at the beginning of 1945—1946, at $5.50 a case. Within a few months orange juice price went down as low as $2.00 a case from $5.50. The world's largest citrus processing plant in Florida was ready to go into bankruptcy.

We, like other citrus canners, at this time had a substantial inventory on hand of citrus juices. The inventory represented the prices at the time when it was packed, approximately a $600,000 inventory. We had approximately $400,000 bank loans against

(Testimony of Nicholas J. Winckler.)

that inventory, secured by the inventory. As a matter of fact, we packed this inventory at the recommendation of our banker and with the assistance of our banker, who was willing to make a $400,000 inventory loan secured by warehouse receipts against this loan.

That inventory pack was fatal. That caused us to lose approximately a half million dollars.

Q. (By Mr. Strachan): How much?

A. A half million dollars. On a $600,000 inventory, we lost one half million dollars.

Q. When was that, Mr. Winckler?

A. Now, that loss was taken in installments as the price gradually went down over a period of two years. First, that year when we took the $11,000 loss, we wrote down the inventory only with $48,000. Then we took a much more [1150] substantial loss the next year, and so on.

I have here a letter from Hodge and Company which states exactly the total loss suffered by price reduction, warehousing costs, interest paid, forced advertising, and other circumstances, amounting to a total of $543,667.62, and this loss was taken over a period of three years, 1947, 1948 and 1949.

Q. Now, when you are talking about those years, 1947, 1948 and 1949, are you talking about calendar years?

A. No. I am talking about a fiscal year.

Q. The fiscal year?

A. For the 1946 calendar year, we mentioned $11,000 loss.

(Testimony of Nicholas J. Winckler.)

The Court: Don't mix up calendar years. When you talk of 1946——

The Witness: 1947 and 1948.

The Court: 1947 and 1948, and 1949.

The Witness: Our fiscal year.

The Court: What do you mean by 1947?

The Witness: By 1947 we mean our fiscal year ending January 31, 1947.

The Court: That is what you mean by 1948 and 1949 correspondingly?

The Witness: Correspondingly.

The Court: Now, just a minute. Counsel has a question. [1151]

Q. (By Mr. Strachan): That is, your 1947 fiscal year reflects principally operations conducted in 1946? A. In 1946.

Q. Yes.

A. Now, I like to state that the inventory reduction of $48,000 does not give the complete picture.

On July 31, we had, 1946, $197,000 profit on our books just before we finished the packing season. So the $197,000 was wiped out, and we took a $11,000 loss, so we actually suffered a much larger loss than the $48,000 inventory reduction.

Q. Let's see. What would that amount to? 197—— A. And 11 would be $208,000.

Q. That would be your loss, your true loss in the year ended January 31, 1947?

A. That would be our true loss, losing our profit and losing in addition to that $11,000.

Now, to finish up that situation, we made operat-

(Testimony of Nicholas J. Winckler.)

ing profits every year during 1947 and during 1948, and so on, but these operating profits have not been substantialy enough to wipe out our 500,000 inventory loss. We made operating profits in 1947 of $54,937.

In 1948 and 1949, when the receiver operated during the reorganization, he reported a profit in excess of $50,000.

But these two profits have not been sufficient to [1152] wipe out the $500,000 inventory loss, so that explains why the corporation could not pay taxes, because it is a federal law, so-called tax loss carry forward, that we could take the $500,000 that we suffered and carry it forward for several years.

The Court: All right.

Q. (By Mr. Strachan): You have told us what your total loss was in the fiscal year ended January, 1947. 208,000, I think you said.

Can you give us a comparable figure for the next year, that would be the 1947 processing season?

A. If I have a moment and see if I have a financial statement here, I probably could.

The Witness: Do you have, Mr. Irwin, some financial statements for that here?

Mr. Irwin: Not of 1947.

The Court: He is talking now about the year ended January 31, 1948. That is what you are talk-about, isn't it?

The Witness: Yes, that is what counsel is referring to. But not having the financial statement in front of me, I couldn't remember. However, I could produce it by tomorrow.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Could you approximate for that year as you did for 1947, and tell us if you had an operating profit of so much, but that was more than wiped out by inventory? [1153]

A. Inventory write-off.

Q. Can't you give us an approximate figure on that?

A. Well, I don't think a guess on figures would be of any value to this court.

Q. You weren't guessing on 1946, were you?

A. That figure I remember because that was an outstanding year of 1946. I will never forget it as long as I live. But in 1947, nothing like that occurred. You can have the figure, counsel, by tomorrow.

Q. Getting back to what we were talking about some time ago, that is the year ended January 31, 1948, the year in which you had a loss of 72,000 before inventory adjustment, and then there was an inventory adjustment of 48,000, so if you combine the stated loss with the inventory loss, you get approximately 120,000, according to the books?

A. Pardon me. There must be some mistake in the dates. You used the 48,000 inventory write-off, if I recall, for the fiscal year ending January 31, 1947. Now you use it for January 31, 1948.

The Court: The testimony so far about the 48,000 involved the year ending January 31, 1947, counsel, according to my notes. [1154]

Q. (By Mr. Strachan): In '47 you showed a

(Testimony of Nicholas J. Winckler.)

loss of eleven thousand some odd dollars, is that right?

A. A total loss. But you stated we took an inventory write-off of $48,000, which resulted in the $11,000 loss.

Q. Then at the end of January, 1947, your cash in the bank was $9,000, your total current assets were $267,000, as compared with current liabilities of $325,000; is that about as you remember that year?

A. Well, you are reading from a statement. We could produce other statements from 1945, and then I could make definite statements. Or if you will be kind enough and show me the statement I can verify it.

The Court: Can't you have a photostat made of this so the witness can have one available when you are asking these questions?

Mr. Strachan: They have the originals at the counsel table.

Mr. Dixon: May it please the court, I want to make a statement at this time, that the defendants have had full access to all the records of this plaintiff corporation, including any of the balance sheets and statements that he is talking about.

The Court: You are using the file from the Corporation Commissioner's office?

Mr. Strachan: That is right. [1155]

The Court: Can't we have some photostats made of these sheets?

Mr. Strachan: We could. But as I understand it,

(Testimony of Nicholas J. Winckler.)

they have the originals from which these photostats were made.

Mr. Dixon: We don't have these records here in court, your Honor. I don't know where they are, to be perfectly frank. We would have to search for them in the files of this corporation.

The Court: I will instruct you to have photostats made of these exhibits that come out of the Corporation Commissioner's file, so that the witness may have one available when you question him about it.

Mr. Strachan: Fine.

The Court: Or alternatively to take the exhibit up and put it in front of him so that he can have a look at it.

Mr. Strachan: All right.

The Court: That will be a temporary stopgap until we can have copies.

Mr. Strachan: Yes.

The Court: Are we marking an exhibit number!

The Clerk: Defendants' A-3, your Honor.

(The exhibit referred to was marked Defendants' Exhibit A-3 for identification.)

Mr. Dixon: Is this from the files of the Corporation Commissioner? [1156]

The Clerk: Yes.

Mr. Dixon: I don't have copies of any of these, your Honor.

Q. (By Mr. Strachan): I show you the Winckler-Smith Citrus Products Company balance sheet

(Testimony of Nicholas J. Winckler.)

dated January 31, 1947, on the stationery of Hodge Moore & Company, and ask you if you recognize that document? A. Yes, I do.

Q. On the current assets side it shows that as of that date the company had $9,000 in cash, is that right? A. Correct.

Q. It shows $231,000 of inventories, does it not?

A. Of inventories.

Q. $231,000? A. Yes.

Q. On the liability side——

A. Pardon me. Can't we go one item after the other and not jump through the receivables? I mean if you are taking the whole financial statement, why don't you?

Q. It shows $26,000 of receivables, is that right?

A. Correct.

Q. And your current assets total two hundred sixty-seven thousand plus dollars?

A. Correct.

Q. Of which two hundred thirty-one [1157] thousand—— A. Were pledged.

Q. ——were inventories?

A. Were inventories, yes.

The Court: Which were pledged?

The Witness: Which were pledged.

The Court: All right.

Q. (By Mr. Strachan): Going to the current liabilities side it shows that the loans payable under the warehouse receipts are $292,000—is that correct?

A. That is correct. It bears out what I said.

(Testimony of Nicholas J. Winckler.)

Q. The loans on the inventories exceed the book value of the inventories, is that correct?

A. That is correct, because we took a depreciation due to the price, I mean the change in the citrus juice business, due to the crash that occurred in the citrus juices.

Q. At that time you show an $18,000 installment due on the mortgage within a year?

A. That is correct.

Q. 8,000 of accounts payable? A. Yes.

Q. And you have accrued taxes of perhaps $5,100? A. Correct.

Q. So that against your two hundred sixty-seven of current assets you have current liabilities of three hundred twenty-five thousand, is that correct? [1158].

A. That is correct. Then we have fixed assets $346,000, and other assets $21,000. And we show a net worth of $228,000, to complete the financial statement.

Q. You show the loss here of $11,700?

A. Yes.

Q. That is before the inventory adjustment?

A. No. If that is correct, that we took in 1947, January 31st, '47, an inventory adjustment of $48,000, then that is after the inventory adjustment.

The Court: Is this statement before or after?

The Witness: It is definitely after an inventory adjustment.

The Court: Speak to the jury; not to me.

(Testimony of Nicholas J. Winckler.)

The Witness: It is definitely after an inventory adjustment.

That is the reason that we show a loss, because we wanted to reflect the true picture in our statement, and when the prices of citrus juices fell substantially we had to reduce the value of our inventory.

The Clerk: I am marking Defendants' Exhibit A-4, for identification, your Honor. Another document in Exhibit A.

The Court: A-4 for identification.

(The exhibit referred to was marked Defendants' Exhibit A-4 for identification.)

Q. (By Mr. Strachan): Do you recognize Exhibit A-4 as [1159] a Winckler & Smith balance sheet at the close of business January 31st, '48?

A. Yes, I do.

Q. That shows the loss to have been how much during that year?

A. That shows a loss of $72,221.28 for the following fiscal year ending January 31, 1948.

Q. Now, during that year did you make an inventory adjustment? A. Yes, we did.

Q. That was in approximately the amount of $50,000, was it not?

A. I think the inventory adjustment was much more substantial than $50,000, which is evidenced by the fact that the year before we show an approximately $220,000 inventory, and here the total inventory is reduced to $94,620.

(Testimony of Nicholas J. Winckler.)

Q. What would you say was the amount of the inventory adjustment made in the fiscal year ending January, '48?

A. Our accountant can testify to that.

Q. Doesn't it show down here, reduction in market value of inventory $47,849?

A. That is probably part of it. I don't know if he didn't make other inventory reductions at the semi-annual audit report. We had always July 31st and January 31st audited reports. In this report the adjustment is $47,000, [1160] it is right here.

Q. Then on the face of that report the loss on inventory adjustment, plus the operating loss, would amount to about $120,000?

A. No, there was no operating loss. There was an operating profit. The operating profit in 1947 season, which is expressed in the fiscal year ending Janaury 31st, according to our accountant's statement, operating profit was $54,937.99. But of course the inventory loss wiped out that operating profit, and still left us with a loss.

Mr. Strachan: I ask that the following page of Exhibit A be marked as an exhibit.

The Clerk: Defendants' Exhibit A-5.

The Court: A-5 marked.

(The exhibit referred to was marked Defendants' Exhibit A-5 for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the next page of this Hodge report, which has been marked Exhibit A-5, and is entitled Income

(Testimony of Nicholas J. Winckler.)

Account for the Year Ending January 31, 1948; do you recognize that document?

A. Yes, I do.

Q. Calling your attention to the item near the bottom of the page, Loss from Operations $75,477.29, is that not a correct statement of the operating loss for that year?

A. Not from operations. You see, we showed a loss [1161] for the year of $72,200, which corresponds with the figure of $72,200——

Q. All right.

A. If we did some write-off on inventories, how can that $72,000 total loss, as stated in the financial statement, be the loss from operations?

That should read: Loss from Operation and Inventory Write-Off.

Q. But it doesn't. Here is: Loss from Operations $75,477.29. Following that is a statement of other income and expense. Cash discounts is income. Miscellaneous income is $2,000 more. Loss on the sale of automobile $333.34. That gives you a total, other income, of $3,256. A. Okay.

Q. Now, the accountant has deducted that from the operating loss of $75,000 and has come up with $72,221.28 as the loss for the period, as he calls it; is that correct?

A. Counsel, that isn't what I am referring to. Will you show me here where the inventory write-off is?

Q. Yes, I will.

A. If you call it loss from operations, then

(Testimony of Nicholas J. Winckler.)

please show me where is the inventory [1162] write-off.

Q. All right. Here is the loss for the period, 72,221.

A. Which includes innventory write-off and some loss for the operation.

Q. Over here on the balance sheet you have a loss for the year, 72,221? A. Yes.

Q. Below that is the item, reduction in market value of inventory, $47,849.12.

A. How much is the total loss?

Q. I say you take the loss of 48,000 on inventory, plus the loss for the year of 72,000, and you come up with 120,000 loss as disclosed by that balance sheet, isn't that correct?

A. Well, I have here from the same Hodge and Company a letter which reports for the identical year operating profit of $54,937.

Q. That is not for the full year, is it?

A. It is not for the full year.

Q. All right. I would like to come back to the question.

A. I think I would like to explain, if I may, that I think when we go into these accounting figures. I think it would be a great deal more simpler—our accountant is going to testify anyhow—that we let the CPA testify to these [1163] figures, and these figures will be much more value to the court and jury than a layman's figures. I am not a CPA. Mr. Hodge is. Let him explain it. He kept the books. He has all the working papers. I don't know. I

(Testimony of Nicholas J. Winckler.)

think it would be to your interest if you agree to that, counsel.

Mr. Strachan: I ask that the witness be directed to answer the question pending.

The Witness: I can't.

The Court: Just a minute. Did you prepare these financial statements yourself?

The Witness: No, your Honor, Hodge and Company——

The Court: You did not. Who prepared them?

The Witness: Hodge and Company, CPA.

The Court: You saw them afterwards?

The Witness: I did.

The Court: Are you an accountant?

The Witness: Well, I know something about an accountant, but I wouldn't call myself an accountant. Besides, even if I would be an accountant, I could not answer the question without seeing all the working papers and inventories which are behind that final statement.

The Court: What was the question pending?

(Record read.)

The Court: I recall it now. I think there is merit in the witness' suggestion, Mr. Strachan. On the other hand, I [1164] don't want to limit your right to cross-examination. I think we will take our noon recess at this time. You may step down, Mr. Winckler.

Remember the admonition of the court, ladies and gentlemen. You will be excused until 1:45 this afternoon. That is a quarter of 2:00.

(Testimony of Nicholas J. Winckler.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury is now absent. I have two thoughts. First, I don't want to limit your right to cross-examination. You have a right to cross-examine.

Secondly, this witness did not prepare these reports. He is not an accountant. I am not an accountant. If you would ask me these same questions, I would want to see the complete working papers, and then I would probably have to do a lot of studying before I could ever give you an answer.

Now, I say this advisedly. I think some of your questions have been very unfair when you made a comparison between current assets and current liabilities and omitted in your question a figure for accounts receivable which the witness called to your attention.

Now, somewhere there has to be a middle line between——

Mr. Strachan: Your Honor, I would like to explain——

The Court: May I finish? [1165]

Mr. Strachan: Certainly.

The Court: Somewhere there has to be a middle line between permitting a defendant to cross-examine this man on statements he has made, to show his lack of knowledge or knowledge, to show his bias, to show perjury, if it occurs, all the things

(Testimony of Nicholas J. Winckler.)

that are involved in cross-examination, to prove elements of your case.

On the other hand, the interest of the court is in proceeding along and having, if necessary, expert testimony on these subject matters, and on having something that is at least intelligible to the jury and to the court—I am not saying that I am any more intelligent than this jury sitting over here, but in trying to go through and follow some of these questions, even by looking over the shoulder of the witness in the seat, I have trouble sometimes finding out just what it is you are talking about and what it has got to do with the issues of the case.

You are a good lawyer. Somewhere in between these two situations is the proper course to follow.

Now, Mr. Strachan, you wanted to say something?

Mr. Strachan: Yes. I would like to explain my attitude very briefly. This witness has undertaken to state that he had a highly profitable business. In very broad general terms he has painted a glowing picture. It is a picture that is refuted, and if he had these documents before him at any [1166] time he would know it was refuted by these documents.

The Court: So you want to show——

Mr. Strachan: I want to show——

The Court: ——he is talking through his hat.

Mr. Strachan: I want to show from admissions from the very witness who overstated, I will put it, the financial results of this operation, that he was incorrect. It is not a substitute for that to take his accountant and cross-examine his accountant.

(Testimony of Nicholas J. Winckler.)

In the first place, his accountant may not say, as this witness has said, that he conducted a very profitable operation until he was put out of business. I doubt very much if the accountant will say that. So it must be on cross-examination, as I see it, of this witness.

As to the proposition of making this intelligible to the jury, it is a very difficult proposition. This is going in in sort of a difficult form.

The Court: I know your problem.

Mr. Strachan: But it is the function of counsel, first, to make the record which will support his argument and will support factually his contention, and then it is his function, when that evidence is not in itself clear, to interpret it through argument and other proper presentation. So I am now laying a foundation for what may have to be explained in detail in argument. [1167]

I forgot one aspect. You said I had been unfair. I don't think I was in that question. I wanted to show his inventories and cash, and then without going into other odd items, I went right to the footings of current assets. I didn't reduce current assets at all. I simply pointed out particular components of the total figure, and there was no misrepresentation, there was no trickery, as I see it, in comparing cash with certain current liabilities as long as I take the total of the current assets and compare those with total liabilities.

The Court: Let me say this. My recollection is that you went directly from cash and one other item

(Testimony of Nicholas J. Winckler.)

to total liabilities. However, having known you in this case, I would conclude that you had not done it intentionally and it was inadvertent.

Mr. Strachan: I did not do it intentionally.

The Court: And I may be in error in my recollection, but my recollection was you went directly from cash and one other item, without a sub-total on assets to liabilities.

Mr. Strachan: If I did, I just got ahead of myself.

The Court: It was probably done inadvertently.

Mr. Strachan: It was.

The Court: And I probably, of course, shouldn't have said it was unfair. I may be wrong in my recollection of the record. [1168]

Mr. Strachan: I may be, too.

The Court: And you may be wrong.

Mr. Strachan: Right.

The Court: Certainly you have a right to cross-examine this witness. You have a right to show, if you can, that he is a phony, that he is talking through his hat, that he gives figures without any basis for them.

It would be more understandable to me, of course, if I heard an accountant. I think you should have the same right that I told the plaintiff they could have, to make some summary sheet of various financial statements which an accountant could hand copies of to a jury, and try to let the jury see what the problem is, because you have got the same

(Testimony of Nicholas J. Winckler.)

problem the plaintiff has. With this jumble of figures——

Mr. Strachan: I have the same problem, trying to pick facts out of this book.

The Court: You have the same problem the plaintiff had, trying to make accounting figures intelligible to the jury. It is bad enough to make them intelligible to a judge when you are trying a case without a jury. I am not telling you how to do it. I just wonder whether we are getting enough out of it.

Mr. Strachan: I wish you could, because it is difficult.

The Court: For the time it takes, and I wonder whether [1169] there is some alternate that would serve your purpose and at the same time take less time.

Mr. Strachan: I would like to find it, but I do feel it important to get the admissions by this witness of these specific facts that I am going into.

The Court: You are going to follow up with an accountant who will analyze these figures aren't you?

Mr. Strachan: Yes, sir. I just don't want to have a variance between the plaintiff's testimony on some of these things and the basic materials that our accountant is accepting.

The Court: It wouldn't serve your purpose to ask this witness, to bring out the fact that he is not an accountant, he did not make these statements, that the general statements he made to the jury

(Testimony of Nicholas J. Winckler.)

were generalizations based upon information supplied him by accountants, and these are the records the accountants supplied, and he will stand or fall on what these records show, and so forth?

Mr. Strachan: I don't think that would serve the same purpose, your Honor.

The Court: That could be done in a short time. That wouldn't serve your purpose?

Mr. Strachan: I am afraid not. [1170]

* * *

Q. (By Mr. Strachan): Mr. Winckler, before the noon recess, you stated at one point in your testimony that the loss for the year ended January 31, 1948, shown on the balance sheet as seventy-two thousand and some odd dollars included the loss on inventory adjustment. Upon my showing you the balance sheet and the income account, where the two items were stated separately, I asked you whether it was not a fact that the total loss for the year would be the combination of seventy-two thousand loss on operations and other annual transactions, plus forty-eight thousand of loss on inventory. Are you now able to tell us whether the total loss for the year is or is not the total of the seventy-two thousand and the forty-seven thousand, or approximately one hundred twenty thousand?

A. I could tell from the financial statement, or, [1171] rather, the balance sheet, what the total loss is. But if you kindly recall, I said before the noon recess that I could not identify what portion

(Testimony of Nicholas J. Winckler.)

of the loss is allocated to the inventory loss or to any other loss, without looking over the working papers of our accountant, who made two balance sheets during the year, ending January 31, 1948.

Q. Do you mean he had two balance sheets as of January 31st, '48?

A. No. We aways had on one day only one balance sheet. But we had our books audited twice a year. We had a semi-annual audit, and then we had an audit at the end of our fiscal year, and I have not seen the audit, which we call the semi-annual audit, and I have not seen the working papers, and that is the reason I suggested that our auditor would be better prepared to answer the question than I would.

Q. Can you tell us whether the statement as of the year end shows that the total loss would be a combination of the loss of seventy-two thousand plus the loss of inventory?

A. Having seen the statement for a minute, I recall that there was a $72,000 loss stated in the financial statement, and an inventory write-off against the surplus account. Am I correct on that?

Q. Yes.

A. But how that was arrived at I don't know. I suspect that the $72,000 loss was basically speaking also [1172] an inventory loss. But part of the inventory loss was taken against the surplus account, and the other part was taken against the regular profit and loss statement.

(Testimony of Nicholas J. Winckler.)

That is what I am suspecting, but I think our accountant can verify that. [1173]

The Clerk: I am marking Defendants' Exhibit F for identification, your Honor.

The Court: Defendants' Exhibit F.

(The exhibit referred to was marked Defendants' Exhibit F for identification.)

The Clerk: Counsel wants one of the documents in the group marked F-1, your Honor, as a subdivision.

The Court: What is F? The whole file?

Mr. Strachan: It is the whole series of income tax returns of the corporation.

The Court: All right.

Mr. Strachan: And I am identifying this one page.

The Court: All right. F-1.

(The document referred to was marked Defendants' Exhibit F-1 for identification.)

Mr. Dixon: These are from the files of the plaintiff corporation, counsel?

Mr. Strachan: Furnished to us in discovery in this proceeding.

Mr. Dixon: No objection.

Q. (By Mr. Strachan): Mr. Winckler, do you recognize these as being the files of income tax returns of the Winckler-Smith Corporation, this in particular being for the year ended January 31, 1950?

The Court: That is F-1? [1174]

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: F-1 is the schedule attached to it.

The Court: Well, is F the entire series for various years?

Mr. Strachan: Yes.

The Court: All right.

Q. (By Mr. Strachan): Now, I show you a schedule attached to that income tax return which shows, among other things, cost of sale, and call your attention to the last entry appearing on the schedule, which reads as follows: Operating loss carry-over, loss year ended January 31, $115,559. Is that correct? A. Well——

Q. It is there that way, isn't it?

A. There are a lot of figures. May I have a moment to study?

Q. Yes.

A. I have to look at the whole return for the year ending January 31, 1950.

The Court: Well, just look at it.

The Witness: Yes. We can save time. How much profit did we report? Did you find it on the income tax return?

The Court: Well, just look at the file. You will have a chance to be examined on redirect.

The Witness: Well, that file indicates to me that we reported a net income of $72,320.60, and then we had a loss [1175] carry-forward, which is applicable for a period of five years, and which is the same loss that I testified before, that in 1946 on our over-pack of inventory we lost in excess of $500,000.

The Court: Well, don't repeat that now. The

(Testimony of Nicholas J. Winckler.)

return shows a loss carry-over into the fiscal year ended January 31, 1950, of $115.000?

Mr. Strachan: No, that is not quite right, your Honor. It shows a loss carry-over to that year of $216,000, which is made up of a loss called an operating loss carry-over for the year 1948 of $115,000.

The Witness: In 1949, and $100,503.15, which offset the profit that we made in this year, so we had no obligation to pay income tax, but I want to emphasize the word operating loss. I am not a tax expert, but I know that as far as the Internal Revenue people are concerned, they don't care if the loss is a real operating loss or it is an inventory loss. As long as there is a loss in the financial statement, they call it an operating loss.

So that doesn't mean actual production loss. That includes the loss under inventory and, basically speaking, that is what it is. [1176]

Q. That is just what I thought. In that year you had a $70,000 operating loss, plus——

A. Profit.

Q. I am talking about the year of 1948, where you had an operating loss of $72,000, your balance sheet also showed a $48,000 loss on inventory, and here it says that the loss for the year was $115,000.

A. I tried to say that that $115,000 includes the inventory loss that we took for that fiscal year ending January 31st.

Q. Of 1948? A. Of 1948.

Q. Well, that is what the balance sheet of

(Testimony of Nicholas J. Winckler.)

Hodge and Company showed, wasn't it, an operating loss of seventy-two, and an inventory loss, and the total was about 120,000?

A. But I qualified that, that the word "operating loss" does not mean that we sold merchandise for less than it cost us to produce. Operating loss necessarily includes inventory losses, too. In other words, I want to qualify——

Q. Can you explain why it is that the balance sheet prepared by Hodge, which I showed you this morning and will show you again, shows an operating loss of 72,000, but your income tax shows an operating loss of $115,000?

A. Well, Mr. Hodge will be able to explain it better than I can. [1177]

Q. Can you explain it?

A. But I think I can comment on it.

There are certain deductions, exemptions, that according to the law you can take on an income tax return, which are not necessarily identical with the regular accounting practices of a corporation.

You have on your personal income tax deductible items. You can take a blanket deduction for charitable donations. That doesn't mean that to the penny you have spent for charity exactly the amount that you deduct. There are just little thousand red tapes on an income tax return that keeps the CPA's in business. And that is the reason that I suggested that a CPA should testify to that, rather than I. He will explain. His professional reputation

(Testimony of Nicholas J. Winckler.)

is at stake that the income tax returns are made out correctly.

Q. Is that all? A. That's all.

Q. You pointed out from the document that I just showed you that for income tax purposes the profit you returned for the year ended January 31, 1950, was 72,000.

I asked that this document be marked.

The Clerk: Defendants' Exhibit G marked for identification.

The Court: Exhibit G marked.

(The exhibit referred to was marked Defendants' Exhibit G for identification.) [1178]

Q. (By Mr. Strachan): I show you Defendants' Exhibit G and ask you if you recognize that as a financial statement as of the end of 1950?

The Court: That would be January 31st, '51?

The Witness: January 31, 1950, ending January 31st, 1950.

Yes, I do recognize it.

Q. (By Mr. Strachan): Referring to the last page, I ask you if it is not a fact that the profit for that year is stated at $121,360.21?

A. Yes, it is, that is what we always [1179] claimed.

Q. During that same year, the plant and equipment was sold to Rubin on this sale-leaseback option arrangement for $50,000, was it not?

A. I don't think it was during the same year. I think it was the year before. If I can see again the

(Testimony of Nicholas J. Winckler.)

financial statement or the balance sheet, it will speak for itself.

The Court: Is this from Exhibit A?

Mr. Strachan: Yes.

The Court: What is the next sub-number?

The Clerk: A-6, your Honor.

The Court: A-6 marked for identification.

(The document referred to was marked Defendants' Exhibit A-6 for identification.)

Q. (By Mr. Strachan): I now show you——

A. Does the same question still stand, whether or not the assets are——

The Court: Just a minute, Mr. Winckler. Wait until a question is asked.

Q. (By Mr. Strachan): I now show you Defendants' Exhibit A-6 and ask you if on that you recognize a computation of the loss on the sale of fixed assets by Hodge and Company dated August 22, 1949?

A. In the first place, that computation refers to the fiscal year ended July 31, 1949, and for the income account for the six months ended July 31, 1949. The former exhibit [1180] or document that you showed me was a financial statement ending January 31, 1950, and the question was asked whether or not during the same year the assets of the plant were purchased by Rubin, and I made the statement that I believe it was done the previous year. If I could see that balance sheet that you put on this desk before again, I could identify it.

(Testimony of Nicholas J. Winckler.)

Q. I will get it for you. A. Thank you.

Q. I now hand the witness Defendants' Exhibit G.

A. You are correct. It states on the first page here the fixed assets there sold as of March 1, 1949, under lease and option to repurchase agreement, which provides for the lease, and so on. There is a total evaluation of land, buildings, machinery, and so on, at $457,510.29. So that sale was done during the fiscal year ending January 31, 1950, technically.

I believe that the sale actually took place in January of 1950, but it was not confirmed by the court until after January 31, 1950. So there is again a difference between our accounting procedure. We started out our fiscal year commencing February 1, 1949, with the knowledge that we are operating a leased plant and did not figure the assets of the plant in our books except only leasehold improvements, which means moneys that we invested in the rehabilitation of [1181] buildings and equipment.

From a tax angle maybe the laws and regulations are different, but in order to take away any kind of a shadow that there is some kind of a misunderstanding here between the tax returns and the actual financial statements, our tax returns show in two columns, the one column shows the figures which are applicable according to government laws and regulations, as far as tax return is concerned.

Next to it, it shows actually the figures that we are keeping in our books so that the Internal Revenue people had the chance to see both figures, so the

(Testimony of Nicholas J. Winckler.)

jury shouldn't be under the impression that there were two sets of books or two different kinds of appraisals, or anything like that. It was all on the same income tax return.

Q. Now, getting back here to Exhibit A-6, isn't it a fact that Hodge and Company's report states that on March 1, 1949, the corporation sold all of its fixed assets subject to the mortgage payable thereon for the sum of $50,000, which resulted in a loss of—well, we will call it $169,000.

A. That is correct. [1182]

Q. Now, this profit for the year shown in the income account, for the year ended January 31, 1950, of one hundred twenty-one thousand some odd dollars was before reflecting the $169,000 loss on sale of fixed assets, was it not?

A. No, it did not reflect the loss on fixed assets, because operation naturally commenced after the date that the sale took place. It affected the surplus account, but not the operating profits.

Q. So the loss on the sale of assets in that year more than offset the operating profit, isn't that a fact?

A. Not according to that financial statement, and not according to the income tax return that we filed.

The fiscal year ending January 31, 1950, was a year of a clean profit of $121,000. That is the way I see it.

Q. You mean that your operating profit actually during that year amounted to $121,000, plus enough to offset the loss of $169,000?

(Testimony of Nicholas J. Winckler.)

A. The $169,000 operating loss——

Q. No. But it was a loss in the year, wasn't it?

A. The $169,000 loss on sale of the plant property, according to our accounting, if I have that correct, was a loss which occurred during the reorganization, during Chapter 11. The plant was sold by the receiver, in fact. That was a court sale, too. And the receiver, with court approval, in the court of Referee Head, sold the plant. And that [1183] took place during the months of December, '48, and January, '49.

Now, I don't know technically which is the date of the court approval, but I know that the receiver submitted that sale to the referee and the referee confirmed it. So that loss was taken during the reorganization.

We started operating after the reorganization was completed, and the proceedings were dismissed, and the corporation was restored to its full rights. We started operations not before May or June, 1949.

So the fiscal year ending January 31, 1950, in no way could be involved with the previous year when the plant was sold by the receiver at a loss of $169,000 to Rubin and associates.

Q. That was as of March 1st, wasn't it, of 1949?

A. I don't recall which is the technical approval date, approved by the court.

I am certain that the sale verbally was approved in the courtroom of Referee Head during the fiscal year ending January 31, 1949, and not 1950.

(Testimony of Nicholas J. Winckler.)

Q. Would you accept Hodge's statement as to the date of that sale and that loss as being correct?

A. I think I would. However, I think it would be much more precise if the records from Referee Head's office would be made available, because they would speak for themselves. It would be more conclusive, I believe, than an accountant's [1184] statement.

Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

A. Well, that isn't so simple.

Q. Well, isn't it a fact?

A. It is not a fact. It is far from being a fact.

Q. All right. That $38,000 write-off, if it did occur, would have increased the loss for the year, wouldn't it, by about $40,000?

A. I wouldn't think it would have had any effect on the loss one way or the other way.

Q. Now, to get this straight, if on one day the corporation's books showed as due from Nicholas J. Winckler $38,140.33, and on the following day they wrote that off of their books, so that it no longer appeared as an asset, you say that wouldn't make any difference?

A. No. If counsel would permit me to explain that, that is a rather involved transaction, but I think two minutes' time could clear it up.

That $38,000 indebtedness resulted from two items. In 1946 my service contract called for a sal-

(Testimony of Nicholas J. Winckler.)

ary and a bonus, and the bonus was payable semi-annually. In 1946, on August 1st, or rather July 31st, which was the end of our first [1185] semi-annual fiscal period, we showed profits in excess of $200,000, that was before the crash occurred, and I had a drawing account against my bonus, and I drew $20,000. That is one item. The other item, when years later in 1950, when the plant was sold in court to Rubin and Associates, there was a condition to the purchase, and the condition to the purchase——

Q. When was this, now?

A. January, 1949. I beg your pardon. I was one year off. January, 1949. There was a condition on Mr. Rubin's side that Mr. Smith should be paid off. And out of the $50,000 consideration that Mr. Rubin paid over in cash, with the court's knowledge and approval, there were two escrows opened, the one $40,000, which went to complete reorganization; the second portion of $10,000 went in a separate escrow earmarked for the purpose of acquiring Bernard J. Smith's stocks. Mr. Rubin didn't want Bernard J. Smith in the business.

Now, Mr. Rubin requested that I purchase the stocks from Bernard J. Smith, and I did so, and used the $10,000, which he supplied, to purchase the stocks of Bernard J. Smith.

Now, here is the unusual situation—— [1186]

Q. Did you give your note to the corporation for the money that you paid——

A. Well, I come to that.

(Testimony of Nicholas J. Winckler.)

Q. Let me ask you, didn't you give your note for the purchase of the Smith stock to the corporation?

A. Not that I recall, but let me finish, and I probably can clarify that. So I purchased the stocks of Bernard J. Smith with $10,000 supplied by Rubin. Technically, the $10,000 was corporation money, so on the books of the corporation I had to be charged, debited, for that $10,000.

However, at the same time Mr. Rubin, in consideration of financing the future operations of the plant, requested that I sell him 50 per cent of all the stocks then outstanding in Winckler & Smith for a token consideration of $5,000.

I felt that the stocks in the corporation then, after the reorganization was completed, and after we made $120,000 profit, have been worth many, many times the $5,000 that Mr. Rubin requested and succeeded to acquire 50 per cent of all the outstanding shares.

Now, our accountant was left with a problem, how to charge the $10,000? I hadn't received the $10,000. I bought from Smith 38 per cent of shares for $10,000 approximately, and then sold simultaneously 50 per cent of shares for $5,000. [1187]

That wouldn't make good sense on my part, would it?

Q. What did the corporation get out of it, out of the $10,000?

A. What the corporation got out of it? The corporation got out of it working capital.

(Testimony of Nicholas J. Winckler.)

Q. I mean out of the $10,000 that went to purchase the stock of Smith.

A. Well, that was part of the Rubin deal. The corporation got a loan of $45,000 immediately and got additional working capital, got bank credit, and so on, and so on, and the corporation was able to get back into business, discount its accounts receivable and draft collections, and so on. We did about a million and a half of business and made $120,000 profit, so the corporation came out all right.

However, the subject still remained open, how to treat that money. So here is how we solved the problem.

We went to the Internal Revenue people and we asked the Internal Revenue people that they should rule on it. We showed them all the original documents, the Rubin agreement, the reorganization, the sale of the plant, and how I got the money, how it was used for, the Smith deal, and everything, and not until 1954 did the Internal Revenue people rule on it, and the ruling was that that indebtedness of 30 odd thousand was regarded as a proposition of long term capital gain, and the Internal Revenue people held that I in fact have not sold [1188] my 50 per cent stocks to Rubin for $5,000, but I sold it for $5,000 plus the forgiveness of an indebtedness, which indebtedness could have been either $11,000 or 31,000, because it was unclear whether or not I was obligated to repay a bonus which I earned, but which later on, due to change in business conditions, was lost.

(Testimony of Nicholas J. Winckler.)

So I paid taxes after that long term capital gain of $30,000, and after the Internal Revenue people ruled, then the entries in the books were made accordingly.

Q. The corporation didn't get the money that you paid Smith for Smith's stock, did it?

A. The corporation never furnished the money, because Rubin paid that money. It came out from Rubin's pocket and not the corporation pocket.

Q. It came out of part of the 50,000 that Rubin was to pay the corporation, didn't it?

A. Yes, but Rubin committed himself only to pay $40,000 to the corporation and the $10,000 was a separate deal, and that was a condition. In order to pay $40,000 to the corporation, he said, "Well, I am going to pay into another escrow $10,000 earmarked for the sole purpose that Smith is going to be bought out from that business."

Q. When you bought that Smith stock with the money that came from the $50,000 purchase price and took the stock yourself, the corporation set up a charge against you—— [1189]

A. I didn't took it. You see, Rubin wanted to buy that stock because he wanted 50 per cent of the shares. I couldn't deliver 50 per cent of the shares and be still a shareholder, a principal shareholder, without getting Smith out.

So what happened. I bought Smith's shares, which amounted to about 36 per cent or 38 per cent, and simultaneously Rubin got 50 per cent of the shares. So Rubin got more shares than we bought from

(Testimony of Nicholas J. Winckler.)

Smith. He used me only as a tool. I was the go-between. That he did for tax purposes.

I didn't acquire the additional shares. I lost shares.

Q. You didn't use your own money in this transaction, did you? A. No.

Q. The stock certificates were transferred from Smith to Winckler, weren't they?

A. From Smith to Winckler, and simultaneously——

Q. Now, at that time the corporation charged you on its books with the amount of money that you used to buy Smith's stock, didn't it?

A. Well, let me put it that way, that——

Q. Can't you answer that yes or no?

A. I cannot answer it yes or no, but I will make it very clear. At that time I did not spend much time accounting, [1190] so I don't know what they charged, but later on I found out that they have charged the 10,000 on the books against my account, and I went to Hodge and complained about it.

Hodge told me that he was misinformed about the transaction.

Q. Who misinformed him?

A. Our regular accountant.

Q. Wasn't Hodge your accountant?

A. Hodge is an auditor, a CPA, who is running his own business, his own office, and who was auditing periodically our books. He came down once a month and he furnished us a certified audit twice a year.

(Testimony of Nicholas J. Winckler.)

Besides that, the corporation had its own accounting department. We had a chief accountant and we had sometimes one, sometimes two junior accountants.

When Hodge came to the office I was not always present. I was probably on a business trip or back East, so Hodge admitted that our chief accountant did not give him the correct picture about that $10,000, and when I showed Hodge all the documents, he said, "I would have never left that $10,000 as a charge against your account if I would have known all the circumstances."

I have a letter somewhere in my files at home where Hodge is giving me a letter to that extent and a copy of that letter was used officially with the Internal Revenue people. [1191]

So whether or not the $10,000 temporarily was charged against me or not is, I think, unimportant. The main thing is it should never have been charged against my account.

Q. Isn't it true, also, that because of that forgiveness of indebtedness and the use of part of the purchase price of $50,000 to purchase stock which you got for which you never paid the corporation anything, the trustee in these reorganization proceedings now pending filed an objection to your claim?

A. The trustee did file a technical [1192] objection——

Mr. Dixon: If the court please, I object to that.

(Testimony of Nicholas J. Winckler.)

I think we ought to try to draw a line somewhere in this line of questioning.

The Court: Sustained.

Mr. Strachan: I should like to make an offer of proof, but I can do that at some later time.

The Court: Well, you may, but whether the trustee objected or not wouldn't mean anything. The trustee might have been right or he might have been wrong. The fact that he elected to object doesn't prove anything.

The Clerk: I have marked Defendants' Exhibit H for identification.

(The exhibit referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Strachan): I show you Exhibit C, which is the financial statement of Winckler & Smith Products Company prepared by Hodge Company, and I show you—— [1193]

* * *

Q. (By Mr. Strachan): ——as of July 31, 1951, and I show you the income account, which is the last document there, and ask you if it isn't a fact that that shows for the first six months of that fiscal year a loss for the period as $148,307.86?

A. That is correct.

Q. Now, referring to the balance sheet, which is a part of that exhibit, it shows that the total current assets were one hundred thousand dollars, made up of $92,000 of inventories and finished products, which were pledged to secure loans of $58,000?

(Testimony of Nicholas J. Winckler.)

A. No, they were not all pledged. That includes $11,000 not pledged.

Total current assets, five thousand cash, two thousand seven hundred—less two thousand seven hundred—just a second. Five thousand cash, accounts receivable $20,300, less $17,000 advances by bank or finance company, leaving a net receivables of $2,700, inventories $92,000, out of which $11,000 is not pledged, the balance was pledged, making [1194] total assets of $100,000—current assets of $100,000. And we show here fixed assets in the amount of $721,000, and other assets in the amount of $21,000.

Q. So you show total assets on that statement of eight hundred——

A. $842,000. And we show liabilities of $220,000.

Q. You mean current liabilities?

A. Current liabilities.

Q. Those current liabilities included——

A. Included the mortgage, because the mortgage was all due and payable within one year, and according to regular accounting practices anything which is payable within 12 months is regarded as a current liability.

So the $220,000 current liability includes the $50,000 mortgage.

Q. That is that RFC mortgage?

A. That is the RFC mortgage.

Q. You owed your trade accounts payable——

A. We owed the trade accounts and brokers about $97,000.

That offsets the 100,000 current assets. But our

(Testimony of Nicholas J. Winckler.)

current liabilities exceeded our current assets at this statement, because we lost $145,000.

That was the bad year. That is what we are complaining about. [1195]

Q. And that shows that the loss for the period prior to July 1st or to July 1st, 1951, was $148,000.

A. Correct.

Q. Now, I will show you the document that has been marked Defendants' Exhibit H, which is the report of Hodge and Company to the Board of Directors of Winckler-Smith for the fiscal year ended January 31, 1952; do you recognize that?

A. Yes, I do.

The Court: January 31st what year?

Mr. Strachan: '52.

The Witness: '52.

Q. (By Mr. Strachan): The income account shows the loss for the yearly period to be $184,523.20?

A. That is correct. That is the same year.

Q. Mr. Winckler, as I recall it, you testified that within what we might call the crop year of 1951 you processed no orange juice, single-strength orange juice, except, I believe, under contract for the Silzle company; is that correct? A. Except what?

Q. Except the juice that you processed for Silzle and Company? A. That is correct.

Q. And I think you testified that the orange juice that you packed for Silzle was packed in 5½ ounce and [1196] 12½ ounce containers only?

A. In 12 ounce containers.

(Testimony of Nicholas J. Winckler.)

The Court: 5½ and 12?

The Witness: Yes.

Q. (By Mr. Strachan): Two sizes only?

A. Correct.

Q. And that you didn't in that year pack any juice in other sizes for anyone?

A. That is my best recollection.

The Court: Mark that entire book with the exhibit number next in order, which will be I, and then pick out the pages, starting with I-1.

(The exhibit referred to was marked Defendants' Exhibit I for identification.)

The Clerk: The pages carry serial numbers.

The Court: Then we can just refer to the [1197] page.

Q. (By Mr. Strachan): I show you this volume that has been marked Exhibit I, called Winckler & Smith Daily Laboratory Statistics, January 8, 1951, to December 17, 1951, and call your attention particularly to sheet No. 735, dated July 10, 1951, and ask you if you recognize that as being the form of daily laboratory statistics used in the plant.

A. Yes, I do recognize the form.

Q. At the extreme—well, it starts out Plant Equipment, and then a code—what does that code mean, do you know? A. I wouldn't know.

Q. And then the column in the left-hand side says "Time," and then the next column is headed "Raw Juices Extracted," broken down into subheadings, "Brix" and "Acid." A. Yes.

(Testimony of Nicholas J. Winckler.)

Q. Can you tell us what, in the ordinary course of business, was recorded under the column "Time" and what was recorded opposite that time in the column "Raw Juice Extracted"?

A. Well, under the column "Time," as the word implies, it means when the sample was examined, the hour when the sample was examined.

Q. Where is the sample obtained?

A. On the raw juice?

Q. Yes. [1198] A. From the raw fruit.

Q. From the fruit or from the juice?

A. No. Well, I don't know how to answer that. You can't get juice unless you have fruit. The juice has to be extracted from the fruit.

Q. But this is taken from the tank, isn't it, or whatever vat the juice is in after it has been extracted from the fruit?

A. Well, I am not able to answer that question. That could have been samples taken from the fruit bin as the truck was unloaded, and then—just a second—the fruit extracted in the laboratory for sample purposes to identify the Brix content and to identify the solids, that could be one thing.

Q. Brix and solids are one thing, are they not?

A. No, they are not. Brix and solids are two different things.

The Court: Well, tell us again, because I don't know.

The Witness: Well, the way Mr. Finley ex-

(Testimony of Nicholas J. Winckler.)

plained it, and I try to get close to his explanation, soluble solids are all solids included in the orange. In other words, not only the sugar content, but also the acid content.

Now, the amount of soluble solids is, basically speaking, the result of two factors, how many gallons of juice is in a ton of oranges and what the solid content is of [1129] one gallon of juice. You can have oranges which will produce, instead of average 100-gallon yield, only 90 gallons, but that 90 gallons is so much sweeter, so that the solid content is still higher than most other juice where the yield is 100 gallons.

The Court: Can you tell us in a few words? Solids in all the content——

The Witness: All the solid content, except water, which is contained in a ton of oranges.

The Court: And Brix is what?

The Witness: Brix is strictly sugar content.

The Court: All right.

Q. (By Mr. Strachan): Now, to get back to this, this is a record of some juice that was processed and opened as of July 7, 1951, is that correct?

A. I haven't seen these damn things for so long I have to look at them a little better. In the first place, what I don't see—it doesn't state what it is.

Q. Doesn't it say O.J. up here, for orange juice?

A. I read that O.S.

Q. Did you have a product known as O.S.?

A. No.

Q. You had one O.J. for orange juice, didn't

(Testimony of Nicholas J. Winckler.)

you? A. It could be grapefruit juice.

Q. You mean O.J. could be grapefruit juice rather than [1200] orange juice?

A. I don't know what the O.S. means. It can be the truck driver's initials. It can be anything.

Q. Take this next page, 736. That says G.F.

A. That is definitely grapefruit juice.

Q. You are sure that is not the driver's initials?

A. I don't think so. It wasn't prepared by our regular chemist. It was prepared by a girl named Comstock.

Q. Who is she? Was she an employee?

A. She was for some time, years ago. Now, let's see here. What is the question now? If we canned orange juice or not?

Q. Can you tell from this whether that referred to orange juice?

A. I wouldn't be able to make a definite statement one way. There is a tiny little letter mark on the top, and the next page—here is a G.F., and here is an O.J., and there is one mark that could be O.J. or O.S., and I cannot identify definitely one way or the other way.

I still stick to my testimony that we didn't can any orange juice except Silsle in any volume to speak of, and I think my testimony included that I am not including in such statements a few cases we may can for sample purposes.

The Court: Well, does this sheet show the number of cases? [1201]

The Witness: No, it doesn't, your Honor.

(Testimony of Nicholas J. Winckler.)

The Court: This is laboratory testing?

The Witness: This simply shows samples taken at a certain hour of raw juice.

The Court: All right. Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): That is page 735, is it? Yes. Well, whatever the product was, can you tell us in what size cans it was packed, according to this record?

A. According to this record it was packed in 46-ounce cans. Now, I want to——

The Court: Is that a No. 3 can?

The Witness: Well, they call it sometimes incorrectly a No. 3 can.

The Court: All right.

The Witness: It is the same can as the 46-ounce. I want to repeat again——

Q. (By Mr. Strachan): Some of the juice went into 18-ounce cans, didn't it?

A. Some went to No. 2. This column is for No. 2 cans, and this column is for the 46-ounce cans.

Now, I want to re-emphasize again that I always add to my statement according to my belief or according to my best recollection.

The Court: All right. All right.

The Witness: I don't think I should waste the Court's [1202] time by repeating it every time.

The Court: You have said that. All right.

The Witness: It could be we might have canned a few cases to Silzle other than the 12-ounce and 5½-ounce.

I know one thing, we didn't can any single-

(Testimony of Nicholas J. Winckler.)

strength Valencia orange juice for the trade, for our trade.

The Court: All right. Ask your next question, Mr. Strachan.

Mr. Strachan: I will ask that this book be marked with the next exhibit number.

The Clerk: Exhibit J.

The Court: That will be Exhibit J.

(The exhibit referred to was marked Defendants' Exhibit J for Identification.)

The Court: Are those pages numbered serially, too?

The Clerk: It seems to be a book of account.

The Court: Well, we will catch the pages later. Go ahead. [1203]

Q. (By Mr. Strachan): While we are waiting, Mr. Winckler, I think if you examine the column of "Fill," you will see that there were a number of gallon cans filled with that juice.

A. Do you mean go through the whole book?

Q. No. Just on that one page.

A. On this page I just see under "Fill" 18-ounce, and then "Fill"——

Q. 128, 128, 129; 1, 2, 3, 4, 5, 6, 7 cans of gallon size?

A. That is correct. You see, we didn't had a heading for each can size. We had five or six can sizes. That wasn't 46 ounces, as I stated. We usually put the 46-ounce in this column here (indicating).

The Court: What are these down here?

(Testimony of Nicholas J. Winckler.)

The Witness: That is a 46-ounce can. 46.6.

The Court: That is ounces?

The Witness: Ounces. We always overfilled a little bit.

The Court: There are three sizes?

The Witness: 18-ounce, 46-ounce can, and a gallon size can. [1204]

* * *

Q. (By Mr. Strachan): In this laboratory record I notice that on the first line you have a date and an analysis of the juice extracted.

A. Yes.

Q. And then you skip a line, and then show over in the canning section the size of cans and other matters? A. Correct.

Q. Does that mean that the lot that is analyzed on the first line is the lot that was disposed of or packed or canned as shown on the blank line following it? A. Definitely not.

Q. It doesn't?

A. It doesn't. You see, you take the juice and the plant is going, by the time you take a can you don't know, it may be from a different truck load, entirely different, you don't know from which bin it comes. There is absolutely no connection.

Q. Then you are never able to identify from this record [1205] that these canned products——

A. Was made from that juice?

Q. Was made from that juice?

A. Absolutely impossible.

Q. Do you recognize page No. 292——

(Testimony of Nicholas J. Winckler.)

The Court: Of Exhibit J for Identification?

Mr. Strachan: Yes.

Q. (By Mr. Strachan): Do you recognize that as being a summary of the fruit processed?

A. Well, I have to admit that I do not. That was handled strictly by the accounting.

I think they are photostats which are made smaller from large books. I don't think this is the original size.

Q. You don't think these are——

A. I never had the time to go into these details of the accounting department. As a matter of fact, I even don't recognize that it is our record.

Mr. Dixon: May I ask one question of counsel, your Honor?

Are these records that you are exhibiting to the witness contained in the same kind of a book that you have them in now, or are they a compilation of a lot of photostats of records that you have taken from various books of the plaintiff corporation?

Mr. Strachan: There are apparently four different groups. One section is devoted to cash disbursements, one [1206] to cash receipts——

Mr. Dixon: That doesn't answer my question.

Mr. Strachan: Yes, it does.

One to the sales records, and one section devoted to the summary of fruit received, fruit used, and production.

The Court: Then the answer is that they are from four different sets of record books?

Mr. Strachan: There are in this one binder, yes.

(Testimony of Nicholas J. Winckler.)

The Court: The original record books were in four different sets, and the photostats, then——

Mr. Strachan: Have been combined in this one.

The Court: Were these sheets reduced in size, do you know?

Mr. Strachan: I don't know.

The Witness: I would think so.

Mr. Fisher: I rather think they were, your Honor, but I am not sure.

The Court: The witness intimated something like that, so I wondered if we could straighten that out.

Mr. Fisher: It has been a long time since it was done. I rather think they are a reduction in size.

Mr. Dixon: Then they are not the size of the records as they would appear from the original books of the corporation, I take it?

Mr. Strachan: As I understand it, they are true facsimile [1207] copies reduced in size.

Mr. Dixon: Reduced in size from the original records?

Mr. Strachan: I think that may be true.

The Court: A photostat would be just as good reduced in size, but it would have some bearing on whether the witness recognized the age, that's all. [1208]

* * *

Q. (By Mr. Strachan): I show you this sheet 292 contained in Defendants' Exhibit J, calling your attention to line dated 7/10, that is July 10,

(Testimony of Nicholas J. Winckler.)

1951, which shows under the heading Tons Received, Valencias, 78.39 tons, is that correct?

A. Well, that is what I read.

Q. And under the tons processed, Valencias, for that day, it shows 64.39 tons? A. Yes.

Q. Then in the column entitled Gallons Yield, it shows oranges, 790 gallons? A. Yes.

Q. And then under Feed Tons, it shows—is that 103?

A. It shows, I would say that is pounds, 10,000 pounds. It would be five tons of feed.

Q. And how much oil?

A. 105 pounds of oil, which is about correct. But we don't know if that is Silzle or what. I just want to clarify that. [1210]

Q. From the laboratory records it appears that some of the juice was packed in gallon cans. We know that wasn't packed for Silzle in gallon cans, don't we?

A. I would almost venture to guess that it was packed for Silzle.

We never had much business in gallon cans. It must have been a special request by Silzle.

That is an assumption. It is not a statement.

Q. Well, now, some of it was packed in 46-ounce cans. I thought you testified that you never packed 46-ounce cans for Silzle?

A. That was my best recollection. But I just looked over, the other day, some records that we had here before the court, and I think you have, and counsel has these records, too, and the very

(Testimony of Nicholas J. Winckler.)

little Valencia which was received cannot justify any kind of a pack to speak of.

The financial statement shows only $3,400 worth of Valencia sales, which I earmarked as the being the carload of juice which we purchased from Sunkist and delivered it to the Ralph's grocery stores.

After all, I have to rely on records just the same as our counsels do, and if I see a financial statement where it is broken down in sales, the Valencia sales only $3,400, I think that is conclusive evidence that we shipped and sold only $3,400 worth of Valencia juice, which is the carload [1211] which we purchased from Sunkist and shipped to Ralphs.

Q. Some of this production on July 10th was packed in 18-ounce cans. You didn't pack any 18-ounce cans for Silsle, did you?

A. I have an explanation for that.

We worked at this time with Silsle on a so-called good neighborly policy, and we tried to help them out, and at the same time tried to make at least part of our overhead.

I testified before that Silsle did not have a 5½ ounce or 12-ounce line. So we run it for them. But it could have happened that on a certain day Silsle was running, for instance—and I am using it as an example—grapefruit juice, and they got in a couple truck loads of oranges, so they called on us that we should help them out, their plant is busy running grapefruit juice, and we should run it for them.

That could have happened. But my statement

(Testimony of Nicholas J. Winckler.)

definitely stands, that we have not packed any single-strength Valencia orange juice for ourselves, to speak of, except for a few cases of samples, probably.

Q. You were running samples, then, were you?

A. We were running samples.

Q. They weren't samples of stock in your inventory, then?

A. The samples are used—whenever the crop comes in [1212] the samples are used to send it out to the brokers and let them test the quality of the new crop, and then——

Q. You mean that your samples were made up in advance of the product that was going to be sold from the samples, is that it?

A. Not in advance. Concurring with the opening of the Valencia season. Only this year the samples didn't follow any order, because we couldn't get Valencias at the proper time and proper price.

Q. There has been a good deal of discussion in the record of the arrangement that was made with your creditors in the spring of '49. Can you tell us approximately how much—what per cent of your unsecured creditors' claims were paid as a result of the arrangement? A. I can.

During the receivership we had the school lunch program and we earned $50,000, which the receiver had in cash at the bank. Then we got——

Q. What $50,000 was that?

A. The receiver—during the receivership we run that school lunch program, which was discussed

(Testimony of Nicholas J. Winckler.)

before. It was discussed before lunch here, where we got the fruit from Sunkist on credit terms, and on that contract, with the by-products, oil and feed, we made approximately $50,000 profit. The receiver had that amount in the bank. [1213].

Then we got $40,000 earmarked to be paid for creditors from Rubin.

So we had a total cash consideration ready for disbursement of $90,000. From this $90,000 the cost of administration the fees of the receiver, and attorney fees and so on came out first, and then we had some secured creditors—— [1214]

Q. The expenses incurred by the receiver came out first, too, didn't they, the operating expenses?

A. The operating expenses, and there was surplus of $50,000. He paid his operating expenses and had $50,000 left, so I would say in rough figures there was $90,000 available for disbursements for the reorganisation. First came the cost of administration and attorneys. Then the secured creditors. And then the unsecured creditors.

The unsecured creditors were grouped in two categories, I would say. In one was the bank, which originally was a secured creditor holding warehouse receipts on substantial inventories, as I think I stated, five or six hundred thousand worth of inventory at the price when it was packed. But as the price of citrus juices broke, as I stated, late in 1946 and keeping on in 1947, the bank found itself unsecured, because the loan was larger than the value

(Testimony of Nicholas J. Winckler)

of the collateral. So the bank changed position and became an unsecured creditor.

So the receiver, of course, and the court handled the reorganization, the plant was sold in court and $90,000 was available. I don't recall exactly how much the unsecured creditors got. It was a small difference between—if my recollection is correct, they got only 13 or 14 cents on the dollar in course of the reorganization.

However, after the reorganization the corporation paid all these small creditors in full, and the only one, to [1215] speak of, who really lost money was the bank, who forced the issue of liquidating the stocks.

Incidentally, I like to point out here one thing. If we would have had these stocks one year longer, we would have gotten about $2.50 more for the merchandise than it was sold for.

Q. Isn't it a fact that the total of the unsecured claims was $252,000 and that the total paid was less than $28,000?

Mr. Dixon: If the court please, I really rise to object to any further questioning along this line. I don't see its materiality to the issues of this lawsuit. I have no objection, if the court feels it is of any assistance in any way to the issues of this case, but so far I don't see it helps in any way.

The Court: The objection is sustained for the reason that this was done under court order. What may have happened prior thereto that led to court proceedings is one thing. After it came into court.

(Testimony of Nicholas J. Winckler.)

what the court does is not chargeable to any litigant.

Mr. Strachan: I would like to make an offer of proof, if I may.

The Court: You may.

Mr. Strachan: Out of the presence of the jury or in the presence of the jury? [1216]

The Court: You can do it later, yes.

Q. (By Mr. Strachan): Did you pay all of the smaller creditors off the amount that they lost on this bankruptcy?

A. I would say almost everybody. I know that we paid all our brokers. We paid our fruit suppliers 100 per cent. I am holding here a letter in my hand, a photostatic copy, of the Davenport Brokerage Company, which states that:

"Especially we want to thank you to pay in full the loss we took on your account three years ago. There are not very many firms who would have felt themselves obligated, as you did, to reimburse us for this loss, and we wish to assure you we are going to reciprocate by obtaining just as much business as possible from your Florida production this winter and from California again next summer."

Signed Davenport Brokerage Company, J. E. Schmeltzer, and dated December 1, 1949.

That is from Davenport, Iowa.

Q. Isn't it a fact that Exchange Orange Products Company was one of the small creditors who took a loss in that bankruptcy?

A. Of how much?

(Testimony of Nicholas J. Winckler.)

Q. I say isn't it a fact that it was one of the small creditors?

A. I don't know. I don't recall that the Exchange Orange Products is a creditor. [1217]

Mr. Dixon: If the court please, I object to the question. The representative of this company, perhaps Mr. Strachan was not here, has testified they never lost a dime on anything ever sold or delivered to this company, the plaintiff corporation. I think you may not have been here when that testimony was offered.

Mr. Strachan: The records of this court will show otherwise.

The Witness: How much?

Q. (By Mr. Strachan): You don't have any recollection? A. I have not.

The Court: Well, let's settle the objection.

Mr. Dixon: I think it is immaterial.

The Court: The objection is overruled. Mr. Finley did testify as Mr. Dixon indicated, but he may have been misinformed or there might have been some other fact——

Mr. Fisher: May the court please, I would like to correct that, if I may. I think the testimony was made by Mr. Kelly, who was the Sunkist man in charge of the Citrus Distributing Plant, to the effect that Sunkist did not lose. I recall no testimony of Mr. Finley to that effect.

The Court: We can find out later. My recollection may be subject to correction. I think the question was asked of both of them, but I may be wrong.

(Testimony of Nicholas J. Winckler.)

The jury will have to recall the testimony that was [1218] given and not take it from the court. My memory is no better, and many times it will be worse than your recollection will be.

The objection was overruled. The question was answered, was it not?

Mr. Strachan: Yes, sir.

The Court: It may stand. What was the answer?

(Answer read.)

Q. (By Mr. Strachan): The amount that was lost, the difference between what was paid the unsecured creditors and the amount that was owed them before this arrangement, was approximately $200,000. After the arrangement had been concluded, the creditors had accepted their loss, the amount of that loss, due to the settlement, was put on the books of the Winckler-Smith Corporation as a part of the corporate surplus, is that not a fact?

A. Well, again, from a correct accounting angle, how that has to be handled should be answered rather by a CPA than by myself. [1219]

Q. Well, do you know whether or not the $200,000, which was lost by the creditors in this arrangement, was put on the books of the corporation after the arrangement as an increased corporate surplus and so reflected additional capital in the business?

Mr. Dixon: If the court please, I object to the question. There is no evidence here that I recall of

(Testimony of Nicholas J. Winckler.)

any loss by the creditors of $200,000 in this arrangement.

Whatever the records of this proceeding back in '47 are——

The Court: All right. I will sustain the objection.

If you have some document there, Mr. Strachan, exhibit it to the witness.

Mr. Strachan: I wonder if the court can't take judicial notice of its own files, or allow me to read from its own files.

This is the original court file that I hold.

Perhaps we can't take judicial notice of it, but I think I should be permitted to read from the original records of this court.

The Court: Your question concerned something about surplus. Do you propose to follow up?

Mr. Strachan: Well, yes, but Mr. Dixon's objection was that there was at this point no evidence in the record as to what the loss to the unsecured creditors was, and the [1220] court's order approving the arrangement shows that in the aggregate on the page that I have opened the court's record to.

Mr. Dixon: And if the court please, the objection is on the further ground that it is wholly immaterial to the issues of this lawsuit, and in no sense of the term tends to throw any light on the issues of this lawsuit.

The Court: What is the materiality of it, Mr. Strachan?

Mr. Strachan: The materiality is that the books

(Testimony of Nicholas J. Winckler.)

of account and the balance sheets, after this reorganization, were made to reflect, as an additional asset, the amount that had been lost by the creditors, and thereby showed a condition of solvency, which was entirely fictitious.

The Court: That is the sole purpose of the offer?

Mr. Strachan: That is right. It is to show that the book statement of values is incorrect.

The Court: All right. Subject to you hooking the matter up, the matter which you have indicated, I will overrule the objection.

Would it be proper to read from this file?

Mr. Dixon: Yes, I have no objection to reading anything from the official records of the court.

The Court: Have you checked to see if there were any further payments to creditors?

Mr. Strachan: That, I believe, is the final approval, [1221] as I understand it, your Honor.

The Court: I think I should read the totals paid to the various classes.

This is an order for payment made in bankruptcy case 45850-B, entitled In the Matter of Winckler & Smith Citrus Products Company, Debtor.

I say bankruptcy case, because we classify under our numbering system all Chapter 10's and 11's, and actual bankruptcies, as bankruptcy proceedings, and of course as I told you before, Chapter 10 and Chapter 11 are part of the Bankruptcy Act.

This was, however, not what we speak of as an orthodox bankruptcy. It was a reorganization proceeding.

(Testimony of Nicholas J. Winckler.)

The order was made June 28, 1949. Creditors were divided into various classes.

Class B creditors, as I read the file, were paid in full a total of $7,914.33.

Class C creditors—and this order doesn't indicate the basis of this class—were apparently paid in full $9,280.28.

Class D creditors were apparently paid in full $2,397.27.

Class E creditors were apparently paid a pro rata—and that seems to be the last group of creditors—their total claims totaled $252,358.37, and they were paid pro rata $27,829.18.

Now, this is an order for payment. I assume that payment [1222] was made pursuant to the order?

Mr. Fisher: Yes.

In the file elsewhere is an order confirming the third amended plan, and that plan provides for the classification. The $252,000 class, which we are referring to, were the unsecured creditors.

The Court: General unsecured creditors?

Mr. Fisher: General unsecured creditors, yes.

Q. (By Mr. Strachan): Mr. Winckler, I will put the question again: Isn't it a fact that the difference between what you owed your unsecured creditors before the bankruptcy arrangement or settlement, and the amount that you paid them, which was in excess of $200,000, was written into the books as an addition to capital surplus?

A. May I see the financial statement that you are referring to?

(Testimony of Nicholas J. Winckler.)

Q. I am just asking if it isn't a fact. I don't have a financial statement before me now.

A. Well, it wouldn't be of much value that I talk by memory, if there are financial statements available. And the reason that I want to see the financial statement is because I want to prove that not a penny, which figured in reorganization, was used to increase capital assets of the corporation, according to financial statement made later on by accountants. [1223]

Now, any forgiven indebtedness in the course of the reorganization has to be carried through the books some way. The Internal Revenue people are interested in it, and the books have to be brought up to date to show the difference between the amount actually paid and the amount which was actually owed.

Now, I am not an accountant, but I could ask the question, in which way would you write it off if not against capital surplus? [1224]

Q. I ask you whether you knew that it had or had not been put on the books of the corporation so as to become a part of the corporate surplus with the same effect as if it represented an addition to capital.

A. I cannot answer that question without seeing the financial statement, but I can——

Q. As you sit there, you don't know, is that the answer?

A. But I know one thing, that it was done the proper way and the right way.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I move to strike the answer and ask that the witness answer the question whether he knows or does not know.

The Court: He has answered that he doesn't know. The balance of the statement may go out. The jury will be instructed to disregard it. We will hear from expert accountants.

Q. (By Mr. Strachan): One of the products that you mentioned having manufactured and offered for sale was a group called Citrus Cocktail, is that right? A. Correct.

Q. What products did that embrace?

A. The Citrus Cocktail is, basically speaking, a blended juice which was mentioned in this court several times, a blend of orange juice and grapefruit juice. The only difference [1225] between the regular blended juice and the citrus cocktail is that there was a little bit of lemon juice added to it, which gave it a tangy flavor, and the citrus cocktail was really meant to be more or less part of the trade-mark.

Q. Now, it was composed only of orange juice and grapefruit juice——

A. Orange juice and grapefruit juice and——

Q. And lemon juice.

A. There was a very little lemon juice added to it.

Q. A little lemon juice.

A. A little lemon juice to flavor it. That made the only difference between the customary blended

(Testimony of Nicholas J. Winckler.)

juice which is manufactured by everybody and the Citrus Cocktail.

Q. During what periods did you pack Citrus Cocktail?

A. We packed Citrus Cocktail in 1946 and we packed in 1949 and we packed in 1950. Whenever we could get—we didn't pack in 1951 because we couldn't get Valencia oranges, I believe. It could be that we packed a very small quantity even in 1951.

Q. Were the oranges used in the Cocktail Valencias? A. Yes, they were.

Q. Did you ever use any navel oranges in packing the cocktail?

A. Not that I would recall of. We definitely didn't use any navel oranges prior to 1949. It is possible that in [1226] 1949 maybe we used a very small quantity to blend it with the Valencia oranges, but I don't believe so.

Q. There was no citric acid or anything of that sort added to change the acidity of the product, was there?

A. No. Lemon juice was added to change the acidity.

Q. Never any citric acid?

A. Never any citric acid.

Q. Now, that cocktail was packed in two sizes, wasn't it, No. 2 and No. 3 can?

A. Correct. No. 2 and the 46-ounce.

Q. Combining those two, I believe your books show that you produced in the year ending Janu-

(Testimony of Nicholas J. Winckler.)

ary 31, 1947, the crop year 1946, you might say, a total of 271,700 cases of that, is that about right?

A. In excess of 270,000 cases?

Q. Yes. A. That could be right.

Q. And that you sold a little less than 190,000 cases, is that right?

A. Sold up to which date?

Q. To that same date, that is in the fiscal year ending with January, 1947.

A. Well, that is probably right, too.

Q. So that you then had in inventory 83,000 cases.

A. Well, that sounds right. We are talking about [1227] Citrus Cocktail alone now. We are not talking about orange juice.

Q. That's right, just the cocktail. [1228]

* * *

Q. Mr. Winckler, you named yesterday several persons you contacted in your efforts to refinance the loan on the plant and persons you contacted in an effort to sell the plant. I believe you said you would furnish us with a complete list today.

A. Yes. I would be very glad to. The complete list includes probably over 100 people and companies, but I brought along part of the file and I am glad to mention the following names. I mentioned already Blair Holdings Corporation. I am holding in my hand a letter dated December 26th——

The Court: Don't read the letter. You have the letter there. [1233]

The Witness: Yes. Also one June 3, 1952, Wag-

(Testimony of Nicholas J. Winckler.)

enseller-Durst Incorporated, Investment Securities.

Morgan & Company, 634 South Spring Street.

A certain John H. Arnold, Beverly Hills.

Harry and Myron Kunin, West Eighth Street, Los Angeles. They have been in the food business.

Dempsey & Tegeler Company.

Angelus-Mesa Land Company.

ReaLemon-Puritan Company of Chicago.

Q. Do you know what business they are engaged in?

A. Yes. They are engaged in the citrus processing business. I believe they are very well known to Sunkist.

Q. I didn't get that last.

(Record read.)

A. Wilbur Ellis Company.

Incidentally, they turned down the deal on account that they handle export fruit for Sunkist.

DiGiorgio Fruit Corporation of San Francisco and Bakersfield.

Well, counsel, shall I go on?

Q. Why don't you select the more important ones.

A. A certain Sig Brandiss of Los Angeles.

A certain Stewart Wood Lemon of Long Beach.

A certain William Carter Kingbury, Los Angeles. [1234]

Q. Mr. Winckler, it would perhaps shorten this up, and it would suit our purposes just as well, if we could just leaf through the file when we are in

(Testimony of Nicholas J. Winckler.)

adjournment some time. Would that be satisfactory? A. It is up to our counsel.

Mr. Dixon: I think at this time this line of questioning should be continued until it is finished, your Honor. The file is here at the request of the defendants.

Mr. Strachan: We have an opportunity to examine the file, I suppose.

Mr. Dixon: I don't think they are entitled to examine his personal files.

This was brought here merely in answer to an inquiry of the defendant, and the correspondence that is referred to may be used by the defendant and exhibited to them if they wish to see it.

The Court: Let's proceed.

Do you want further names?

Mr. Strachan: I would rather see the file.

Mr. Dixon: I am not going to——

Mr. Strachan: May I see it?

The Court: What is the purpose, counsel, of wanting to see the file? This is not a file of the company. What is the purpose in wanting to see the file?

Mr. Strachan: I would like to see what the nature of [1235] the correspondence is. I think I am entitled to see anything that the witness uses from the stand for the purpose of giving testimony.

Mr. Dixon: If the Court pleases, I have no objection, as I stated, to counsel inquiring and looking at any document that this witness is using to give a name. However, the defendant has asked for

(Testimony of Nicholas J. Winckler.)

the full names of companies contacted by this witness, and I don't think he is entitled to go into any personal file on a fishing expedition at this stage of the trial. I, therefore, object to his being permitted to even look at the file, with the exception of having access to any papers that this witness is using.

The Court: What would be the purpose of looking at the file and the correspondence?

Mr. Strachan: I think it would satisfy my purpose and let me know whether I need go further here, if I could simply see the letters from which he has taken the names up to this point.

The Court: What is the purpose? What would be your purpose in looking at the letters?

Mr. Strachan: To see what the nature of the negotiation was, whether they give any indication of what the reason for denying credit was.

The Court: And, therefore, for purposes of impeachment? That would be the sole purpose. [1236]

Mr. Strachan: That wouldn't be the sole purpose. It might be for the purpose of showing substantial evidence on the issues in the case.

The Court: Substantial evidence in correspondence between this man and third parties?

Mr. Strachan: I wouldn't regard it as correspondence, sir.

The Court: If the third party wrote a letter, it would be hearsay.

Mr. Strachan: It wouldn't be hearsay if it was in response to a letter from him. It would be an

(Testimony of Nicholas J. Winckler.)

exchange of letters in the ordinary course of business.

The Court: But I am looking at what you want factually. Supposing the man replied and said, "I won't buy your plant; it is not worth a dime"—would you contend that would be admissible?

Mr. Strachan: I should think so, yes.

The Court: I don't agree with you.

Now, let's see what might be in Winckler's letter. Supposing Winckler said, "This plant is worth $1,000,000"—that would be impeachment, would it not?

Mr. Strachan: I would regard it as being a self-serving statement, rather than impeachment.

The Court: Supposing the letter said, "My plant is only worth $10,000; do you want to buy it?"—that would be impeachment? [1237]

Mr. Strachan: It would be more than impeachment, sir, in my view. It would be an admission that the plant had only that value.

The Court: Well, for impeachment purposes you have to have some foundation and not go on a fishing expedition. We have had extensive discovery for a long period of time, files that have been asked for have been made available. I am not at this late date going to interrupt the trial for further inquiry into that subject.

Mr. Strachan: I want to make it clear. I am not proposing an interruption of the trial. I propose an off-the-record opportunity to examine the papers.

The Court: Proceed.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: May I have a ruling on my request for access to the papers that he has mentioned so far?

The Court: Based on the showing you have made to date, the motion is denied.

Mr. Dixon: May the record also show, your Honor, that the plaintiff has no objection to having any papers containing the names of any of the people that this witness has thus far testified to made available to counsel for further cross-examination.

The Court: The ruling will be modified to the effect that the documents that he has referred to may be exhibited [1238] to you at some recess.

Mr. Strachan: Thank you.

Mr. Dixon: I think I should further clarify it. I don't think this witness' testimony even shows that there was in all of these instances correspondence. He is testifying to people that he contacted.

The Court: Well, there were certain instances where he exhibited a letterhead to the reporter. The record doesn't show what those were.

The Witness: Your Honor——

The Court: If there is any claim of privilege as to any of the documents involved in the names heretofore recited, it can be called to the Court's attention later.

The Witness: May I make a statment with regard to these letters?

The Court: Yes.

The Witness: These letters I don't think have any importance one way or the other way——

(Testimony of Nicholas J. Winckler.)

The Court: Look, your opinion on that score is not what we are concerned with, Mr. Winckler. I have ruled on this matter. [1239].

Q. (By Mr. Strachan): Mr. Winckler, on examining the transcript of your testimony, I find that at record page 1042 you were asked the following question and made the following answer. This is in relation to the laboratory processing of product:

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is."

Now, in the light of that, don't you think it is a fact that in the laboratory records I showed you yesterday, Exhibit I, I believe it was page 735——

Mr. Dixon: That is I for identification, counsel?

Mr. Strachan: Yes.

Q. ——where it says raw juice extracted, Brix and acid, that the laboratory results shown in those columns refer to the laboratory results of the processed juice in the tanks?

A. I think, counsel, we covered that in length——

The Court: Well, just answer the question.

The Witness: But the question was asked in a different manner yesterday, and I like to repeat the question of counsel because I remember very well how he asked it.

The Court: All right.

(Testimony of Nicholas J. Winckler.)

The Witness: First you asked me the question whether or [1240] not that raw juice is the juice from the fruit as it is unloaded from the truck, or is it the juice from the tank. I am not in position to say what is in the transcript, because we don't have any transcripts at our disposal——

Q. I don't believe that is true. Hasn't the Court made the transcript available to the plaintiff in this case?

The Court: I told them it would be available, but I don't think the transcript was because the transcript of the day before is delivered the following morning to my office, so yesterday's transcript, even if asked for, would not have been available until 10:00 o'clock this morning.

Mr. Strachan: If there is any question about his previous testimony, I would like to clear it up.

Mr. Dixon: Proceed, counsel. You have quoted from the record.

The Court: Let's let him read 1042.

Q. By Mr. Strachan): This is the transcript for Wednesday, the day before yesterday.

A. This is the first time I see the transcript.

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is."

Have I read it correctly? [1241]

A. Yes, you did.

(Testimony of Nicholas J. Winckler.)

Q. Now, in the light of that, I ask you again if it is not a fact that the results of chemical analysis appearing in the column "raw juice extracted" is a record of the results of the laboratory tests taken from the processed juice at that time?

A. And I am repeating again, and you will find it in the transcript, the other question, that when you asked me if that is the test of the raw oranges extracted in the laboratory or it is the test of juice coming from the tank, my answer was, "I don't know," and I repeat the same answer.

Q. You don't know, then, whether this record of the chemical analysis of raw juice extracted is the record of the analysis that you mentioned at page 1042 of your testimony?

A. I have no further comment. I gave you the answer to the question already once.

The Court: It is asked a second time. This is cross-examination. What is your answer now? Do you know or don't you know?

The Witness: I do not know.

The Court: All right. It has been asked twice. Go on to something else.

Q. (By Mr. Strachan): Now, do you recall that I asked you earlier the following questions and that you gave me the [1242] following answers:

"Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

"A. Well, that isn't so simple.

(Testimony of Nicholas J. Winckler.)

"Q. Well, isn't it a fact?

"A. It is not a fact. It is far from being a fact."

Do you recall that testimony?

A. Yes, I do.

Q. It is a fact, is it not, the corporation wrote off that indebtedness? A. It is.

Q. It is a fact that it was written off?

A. I testified to that extent yesterday, if I recall.

Q. You said it is not a fact at 1185. Was that testimony true or false?

A. Will you repeat that again, please?

Q. The questions and answers?

"Q. Now, isn't it true, also, that during the fiscal year ended January 31, 1950, you owed the corporation an indebtedness, or several indebtednesses totaling $38,140.33, which the company wrote off?

"A. Well, that isn't so simple. [1243]

"Q. Well, isn't it a fact?

"A. It is not a fact. It is far from being a fact."

Is that testimony true or false?

A. That testimony is true.

The Court: Now, just a minute. The question has been asked twice. The record will show a long explanation at the time this answer was given. The question was two-fold, that he owed the corporation money and that it was written off. That matter was then gone into extensively as to both parts of the question. I don't think we want at this time to re-

(Testimony of Nicholas J. Winckler.)

read this long explanation, unless somebody——

Mr. Strachan: I am not proposing to do that, your Honor.

I will ask that these two pages entitled minutes of a special meeting of the board of directors of Winckler & Smith Citrus Products Company, a California corporation, be marked.

I would just as soon remove them from the book for the exhibit purposes, but I don't know how to operate this thing mechanically. [1244]

* * *

The Court: All right. Mark it and you may substitute a photostat. What number did you assign, Mr. Clerk?

The Clerk: Defendants' Exhibit K.

(The exhibit referred to was marked Defendants' Exhibit K for Identification.) [1245]

Q. (By Mr. Strachan): I show you this document, Exhibit K for Identification, which on its face purports to be minutes of a special meeting of the board of directors of Winckler & Smith of June 24, 1949, showing Nicholas J. Winckler and Arthur D. Pedlar present, on the second page bearing a signature of Nicholas J. Winckler as chairman, and Arthur J. Pedlar as secretary, and ask you if you recognize the document. A. Yes, I do.

Q. It is a part of the corporate records of Winckler & Smith Corporation?

A. Yes, it definitely is. I think it is in the minute book.

(Testimony of Nicholas J. Winckler.)

Q. Isn't it true that the resolution adopted reads as follows——

The Court: Do you want to offer the exhibit in evidence before you read it?

Mr. Strachan: No. I want to use this for impeachment purposes. I don't think it is proper at this stage for me to offer it. If counsel wants to waive it, I would just as soon have it received in evidence by agreement.

The Court: Proceed.

Q. (By Mr. Strachan): "Resolved, that this corporation secured a loan for the sum of $45,000 from Maxwell L. Rubin and/or his associates, and the indebtedness of Nicholas [1246] Winckler to this corporation in the aggregate sum of $38,140.33 will be considered fully paid and cancelled and of no further force and effect."

That is correct, is it not?

A. That is what it reads, but it needs some explanation.

Q. Does it not also contain this statement:

"Mr. Winckler stated that he had made diligent efforts to secure a loan from all sources, and that it appeared that the only available loan was the aforesaid $45,000 loan received from Mr. Rubin and his associates. The chairman stated that he had sold one-half of the capital stock to Mr. Rubin and he requested that the corporation cancel the aforesaid indebtedness of Winckler in the sum of $38,140.33."

A. I am glad you read that, counsel, because that ties in exactly with my explanation.

(Testimony of Nicholas J. Winckler.)

Q. It also says:

"Mr. Winckler explained that he was presently indebted to the corporation in the sum of $38,140.33 by reason of moneys which had heretofore been advanced or were to be advanced to Winckler in connection with the purchase of certain stock which was at the time owned by Bernard J. Smith and Louise Campbell." A. Correct.

The Court: Can the record show the date of these minutes, [1247] counsel?

Mr. Strachan: Yes. The minutes are dated June 24, 1944.

The Witness: 1949.

Mr. Strachan: 1949. I am sorry.

In addition to that I would like to have marked the immediately preceding document as Defendants' Exhibit L.

The Clerk: Defendants' Exhibit L.

The Court: Exhibit L marked.

(The document referred to was marked as Defendants' Exhibit L for Identification.)

Mr. Strachan: Which is a waiver of notice and consent to a special meeting.

Mr. Dixon: May I see it, counsel?

Mr. Strachan: Surely.

Q. (By Mr. Strachan): On June 24 of 1949 you were a member of the board of directors of the corporation? A. That is correct.

Q. Mr. Rubin was a member, was he not?

A. I don't recall. You have copies of the min-

(Testimony of Nicholas J. Winckler.)

utes. I haven't seen the minutes for years. You can ascertain from the minutes when Mr. Rubin was appointed as a board member.

Q. Mr. Pedlar was not a member at that time, was he? A. At which time?

Q. June 24, 1949.

A. He signed it as secretary, and the minutes state [1248] that present were Nicholas J. Winckler and Pedlar, so how could we hold a board meeting if Pedlar wouldn't be a director?

Q. There was no corporate action at that time making Pedlar a director, was there?

A. I have to repeat again, I haven't seen the minutes for years. You have photostatic copies. You can find out when he was elected to the board.

* * *

Q. (By Mr. Strachan): I show you the document which has been marked Exhibit L and ask you if that bears your signature?

A. Yes, it does.

Q. And it also bears the signature of Arthur D. Pedlar, P-e-d-l-a-r?

A. Yes, it does. May I proceed to explain that?

Q. Who was Mr. Pedlar?

A. Mr. Pedlar was our controller.

Q. At that time?

A. At that time, yes. [1249]

Q. You know he was not a director at that time, don't you?

A. I answered before already, counsel, that

(Testimony of Nicholas J. Winckler.)

I haven't seen the minutes for years. You have photostatic copies. I don't know. I assume if he acted as director, he was a director.

Q. You assume that even though you knew of no corporate record to support the action he might take as an assumed director?

A. Look, I had the power at this time to appoint as director anybody that I pleased to, so why shouldn't I have appointed him? Why do you think that I am going to write up minutes which would work out against my own interest, if I let somebody act as a director without being duly appointed as a director? Wouldn't that be foolish on my part?

Q. Do you say he was a director?

A. I didn't say. You said it.

The Court: Counsel, the question has been asked three times whether he knew, and he says he doesn't know.

Do you know where in the records the matter appears, or is it your representation that it does not appear anywhere?

Mr. Strachan: Was that directed to me?

The Court: That is directed to you.

Mr. Strachan: It is my understanding that Mr. Pedlar was not, according to any corporate record, a member of the [1250] board of directors.

The Court: In other words, you find no record to that effect?

Mr. Strachan: What?

The Court: You find no record to that effect?

Mr. Strachan: That is correct.

(Testimony of Nicholas J. Winckler.)

The Witness: You don't find a record of Mr. Pedlar's resignation as a director?

Mr. Strachan: I find no record of his being elected or otherwise qualified as a director.

Mr. Dixon: If the Court please, I am going to object to any further line of questioning of this type. I understood it was for the purpose of impeachment. Counsel is now going into the question of whether there was a director present, whether as a matter of law it was necessary to have one. The stock ownership of this corporation would be necessary to explain all of those details.

The Court: The objection is sustained.

Mr. Dixon: Objection is made to any further examination of this kind.

The Court: I have sustained your objection.

Mr. Dixon: Thank you, your Honor.

Q. (By Mr. Strachan): Do you remember in the Chapter XI proceedings on December 10th and December 18, 1942, you were examined before a Referee in Bankrutpcy, the Chapter XI [1251] proceedings now pending in this court?

A. Well, there are no Chapter XI proceedings pending in this court.

The Court: Do you mean X or XI, counsel?

Mr. Strachan: Chapter XI, I understand.

The Court: The first proceeding was a Chapter XI; the second one was a Chapter X.

Mr. Fisher: Correction. It was in the current Chapter X proceedings. I am sorry I misled Mr. Strachan.

(Testimony of Nicholas J. Winckler.)

The Court: All right. [1252]

Q. (By Mr. Strachan): Do you recall having been examined?

A. Yes, I do. I don't recall the date, but I have been examined.

Q. Do you remember who counsel was that conducted that examination?

Mr. Dixon: If the Court please, I again rise to object to this line of questioning. I don't see that it has any relevancy to the issues of this lawsuit. If we are going to go into the proceedings before the referee, then the transcript would show, but I don't see its materiality and I object on that basis.

The Court: Is this impeachment, counsel?

Mr. Strachan: Yes, sir.

The Court: Let me see the document.

Mr. Strachan: It begins on page 32.

The Court: And how far, counsel?

Mr. Strachan: Down to, I think it is through 37.

The Court: There are certain parts that are proper, but not the whole transcript.

Mr. Strachan: I didn't intend to do that.

The Court: Pages 32 to 37.

Mr. Strachan: Yes, your Honor. I will say the following questions and the following answers.

The Court: Stick to the matters that are pertinent. Give us the page, too, as you go along. [1253]

Mr. Strachan: Yes, sir.

Q. Do you recall who was present at the time of this examination?

A. In December of 1952?

(Testimony of Nicholas J. Winckler.)

Q. Yes.

A. Well, I assume the attorneys involved in the case.

The Court: Well, who were they? Name them.

The Witness: Well, I think probably Stutman of Stutman, Quittner and Stutman, or Mr. Quittner.

The Court: Who do they represent?

The Witness: They represented the debtor corporation, Winckler & Smith.

The Court: Represented Winckler & Smith?

The Witness: Yes, sir. Then I assume Mr. Walker was present, and his attorney, Mr. Irwin.

Q. (By Mr. Strachan): The two gentlemen who are sitting here?

A. The two gentlemen sitting there.

The Court: Mr. Walker was the trustee?

The Witness: Mr. Walker was the trustee of the debtor.

The Court: And Mr. Irwin was——

The Witness: Was attorney for the trustee.

The Court: All right.

The Witness: Referee Head was the one who conducted the examination. [1254]

The Court: He presided?

The Witness: He presided. I don't think there was anybody else present that I know of.

Q. (By Mr. Strachan): You were asked at that time certain questions as to whether Mr. Pedlar was shown by the corporate records to be a director at the time of the June 24, 1949, meeting.

You said, "Well, the minute books"——

(Testimony of Nicholas J. Winckler.)

The Court: Let's have page and line, counsel.

Mr. Strachan: I am sorry. Page 33. It begins on the first full line. The answer——

The Court: What was the question?

Mr. Strachan: I will go back and read it. I will start at page 32, line 16, for sake of continuity.

"Q. Can you show me any minutes where he was elected as a director? It is a short period between those dates, 17 days?

"A. May I check for a second the book?

"Sure.

"A. Well, didn't you remove certain minutes from the book?"

The Court: Now, just a minute, counsel. We will take a short recess. Ladies and gentlemen of the jury, you will be excused. Remember the admonition of the Court.

(The jury left the courtroom at 10:45 [1255] a.m.)

The Court: The record will show the jury absent.

I said at the bench I thought you were a good lawyer. I am not so sure. You may impeach this witness until the cows come home. You can say to him, "Mr. Winckler, did you ever remove any minutes from the books," and if he says, "No, I never did," then you can impeach him by that transcript.

Mr. Strachan: Your Honor——

The Court: But you can't ask him the question—let me finish first.

Mr. Strachan: Surely.

(Testimony of Nicholas J. Winckler.)

The Court: You know this as well as I do, to impeach a witness you have to lay a foundation. That is fundamental. You say to the witness, "Did you or did you not say Mr. Pedlar was or was not a director?" Then he gives you an answer. Then you may impeach him on that subject.

You have asked no question about whether he removed exhibits from the book. There are questions in there, a lot of matter which is clearly extraneous to the foundation laid. I went over the transcript and I said there are many things in there that are impeaching and there are matters that are not on the foundation you have laid. I didn't spell it out for you. I said you are a good lawyer, in substance, and I think you will know how to handle it.

What do you have to say? [1256]

Mr. Strachan: I have this to say, your Honor. I think you are under a misapprehension. I did not intend to show Mr. Winckler had removed minutes, because the record is to the contrary. The portion of the record that I was reading from is a portion in which Mr. Winckler asks if some of the minutes have been removed, not whether he removed them. So it is perfectly all right.

The Court: Let me see the transcript.

Mr. Strachan: Yes, sir.

The Court: There are several questions in there where you can get your impeachment.

Mr. Strachan: I was going to avoid this by starting at the top of page 33, but you asked me for the question.

(Testimony of Nicholas J. Winckler.)

The Court: I know. In addition to laying a foundation for impeachment, the next step is to say, on a certain date at a certain time, and then as a matter of courtesy to counsel, give the page of the transcript, was the following question asked and did you make the following answer?

If the witness says, "Yes," that is the end of it. If he says he didn't——

Mr. Strachan: Mr. Winckler's testimony is rather rambling and it takes several pages of it to get to the ultimate fact, which is he admits there is no corporate record that Pedlar was a director.

The Court: The question was, where I stopped you— [1257] the trouble with the transcript is the question, the thing following the question is the word sure, and then the thing that follows the letter A is the question.

You may be right that this was Winckler's statement to somebody else, "Didn't you remove certain minutes?"

Mr. Strachan: He is asking Mr. Walker if Mr. Walker didn't remove the minutes, and we will find on the next page Mr. Walker denied he did. [1258]

The Court: All right. Well, this goes on. You started in with a proper question, which I am going to mark here in blue.

Then proceeds all this matter about removal of minutes, colloquy about "However"——

Mr. Strachan: I wouldn't put that in.

The Court: Who is it? Mr. Irwin; not Mr. Walker. Apparently Mr. Irwin and the witness,

(Testimony of Nicholas J. Winckler.)

"Are you trying to tell the Court"——

I am just looking through this, now.

Now comes an answer, if you want to follow me here, on page 33, line 14. That is an answer to the question over here, is that right?

Now, what else?

(Counsel and Court looking at document.)

Mr. Dixon: I would like to be heard, your Honor.

The Court: On what?

Mr. Dixon: On an objection to this line of questioning on the ground that it is wholly irrelevant and immaterial and does not tend to produce any evidence that will throw any light or be helpful on any of the issues in this lawsuit.

If I understand counsel, his purpose apparently is, in going into this record in the proceeding in this Court, is to in some way show or persuade the jury—that is the only [1259] value it could have, as I see it, if it is for that purpose—that what Winckler said with reference to this $39,000 loan, so-called, back in 1949, was stated yesterday differently from what the record before the trustee or the proceedings in this Court will show.

The Court: We don't reach any problem like that on the part of the transcript shown me. There may be further impeachment. This man is a witness in the case. Any time a man becomes a witness his credibility is put in issue.

Mr. Dixon: That is correct.

(Testimony of Nicholas J. Winckler.)

The Court: Anything that goes to his credibility is proper. And counsel has marked out certain sections. He is checking now for other provisions which bear on the foundation he laid on this matter of Pedlar being a director.

You are at a disadvantage in not having a transcript, I take it. Or do you have a transcript?

Mr. Dixon: I don't have.

Mr. Strachan: I can show it all to him.

The Court: Otherwise you would be in a position to follow along. But you don't have it.

Is there something further, counsel?

Mr. Strachan: Yes, your Honor.

(Counsel exhibiting document to the Court.)

The Court: We might as well take a recess at this time.

(Recess taken.) [1260]

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, what goes on between counsel and the Court is none of your concern. In this particular case there was a misunderstanding between Mr. Strachan and me, which has been entirely cleared up. Nobody is at fault in the matter. We straightened out our misunderstanding, and so we are really back where we were before.

Don't let matters like this concern you. The Judge has the unenviable position of trying to conduct a

(Testimony of Nicholas J. Winckler.)

trial. The facts in this case are going to be decided by the jury. I am not deciding them. Nothing I say or do is any indication of what I think about the facts of the case.

I will have to eventually instruct you on the law, and from time to time I will try to give you some preliminary instructions on it, but the facts are in your sole discretion. You are the finders of the facts, and as such you are judges, judges of the facts.

Mr. Dixon: May the record show, your Honor, an objection by the plaintiff to any further questioning of this kind on the ground it is wholly irrelevant and immaterial to any issue in the lawsuit, and on the further ground that for the purposes of impeachment, if that be the purpose, that the proper foundation has not been laid as required by [1261] the Code of Civil Procedure of California.

The Court: Well, the objection will be overruled.

I am going to say a word about what is meant by impeachment. Every witness for the plaintiff or defendant who takes the witness stand puts into issue his credibility, and it becomes the function of the jury subsequently to determine what weight to give to each witness, and the Court has a rather long instruction it gives you on that, on how to judge the credibility of the witnesses.

You have to weigh the witness' intelligence, his relationship to the case, the way he has testified,

(Testimony of Nicholas J. Winckler.)

what he has said, all the factors that will assist you in determining what weight to give to a particular witness.

That instruction also tells you that in looking at inconsistencies or supposed inconsistencies, you should determine whether the inconsistency is a minor one or whether it goes to some material issue in the case, that people who see things and relate them and recall them often see them differently, honestly relate them differently, and that innocent—if I remember the instruction—innocent misrecollection, like failure of recollection, is a very common experience.

So you must, therefore, judge all these factors in deciding what weight to give to a witness' testimony.

The law provides that a witness may be impeached. Now, that is a lawyer's word. But counsel is entitled to show [1262] that a witness has made contradictory statements, and it is a question for the jury to decide whether the statements were contradictory. It is a question for the jury to decide how pertinent to the issues in the case they are and what effect they have on what you ultimately find by your verdict.

Therefore, when a Court says that evidence is admissible which is offered on impeachment, that doesn't mean that the Court believes or disbelieves that the witness has been impeached. It is merely like other evidence admitted to you for your consideration to make that determination. [1263]

(Testimony of Nicholas J. Winckler.)

Just like when I admit a contract in evidence, that doesn't mean that I have any view about that contract. Or when a conversation is admitted in evidence over objection, the mere fact that I overrule an objection and let it in doesn't mean that I think that the witnesses to that conversation told the truth or didn't tell the truth. That is your job.

So in this case Mr. Dixon is correct that this evidence has nothing to do with the issues of the case, but it is admissible, and therefore I overruled his objection, on the general question of what we speak of as impeachment.

Is that statement satisfactory to both counsel?

Mr. Dixon: That is satisfactory.

Mr. Strachan: I think it is very helpful.

The Court: You may read those questions and answers.

Q. (By Mr. Strachan): Mr. Winckler, in these proceedings before Referee Head on December 10th and 18, 1952, were you asked the following questions by Mr. Irwin and did you make the following answers:

Page 32, commencing at line 16:

"Q. Can you show me any minutes where he was elected as a director? It is a short period between those dates, 17 days.

"A. May I check for a second the book?

"Q. Sure." [1264]

Now, down on line 20, page 33:

"A. My best recollection is, Mr. Irwin, Mr. Pedlar was appointed as a director of the corporation.

(Testimony of Nicholas J. Winckler.)

If you wish, at a later date in the minute book you will find that certain directors were present, where Pedlar was as a director.

"Q. I am granting he signed as a director.

"A. But we have to find where he was appointed as a director?

"Q. Are there any minutes in there?

"A. It will take a little time."

That was read from page 33, lines 14 through 23, inclusive.

Page 34:

"A. Arthur D. Pedlar is a certified public accountant and I don't think he would sign if he was not lawfully a director.

"Q. I am asking you to show in the minutes where Pedlar was elected a director.

"A. I cannot find it here, Mr. Irwin."

Were you asked those questions and did you make those answers at that time? A. I did.

Q. Then at the same hearing you were interrogated with respect to whether or not Mr. Rubin was a director of the corporation at the date of the meeting on June 24, 1949, and I [1265] ask you if Mr. Irwin at that time asked you the following questions and you made the following answers, appearing on page 35 of the transcript, lines 11 to 19, inclusive:

"Q. Now, Mr. Rubin was a director of the corporation on June 27th?

"A. Yes, he was.

"Q. 1944? A. Yes.

(Testimony of Nicholas J. Winckler.)

"Q. I misquote. June 24, 1949, and these minutes of June 24, 1949, recite they are the minutes of a special meeting of the board of directors.

"A. Yes."

Were you asked those questions and did you make those answers? A. I was.

Q. You were asked the questions?

A. Correct.

Q. Did you make those answers?

A. Correct.

Q. During the fiscal year ending January 31, 1950, isn't it a fact that you purchased 60 shares of the company stock from Mrs. Campbell?

A. The fiscal year ending 1950, you said?

Q. Yes, sir. A. The answer is no. [1266]

Q. I am mistaken. You purchased the stock in July of 1946, did you?

A. That is correct.

Q. Isn't it a fact that Mrs. Campbell was paid $6,778 for the stock and that the corporation paid for the stock which you took from Mrs. Campbell?

Mr. Dixon: Now, if the Court please, I am going to register an objection to this kind of inquiry on the grounds it is wholly irrelevant and immaterial to the issues of this lawsuit and does not tend to throw any light on any of the issues of this lawsuit. It is entirely too remote to any such issue.

The Court: What is the probative value, counsel?

Mr. Strachan: It has two purposes, your Honor. One is to show that the credit of the corporation

(Testimony of Nicholas J. Winckler.)

was impaired through diversion of corporate assets, and that Mr. Winckler personally withdrew this as a part of the $38,000 from the corporation which was never restored.

Mr. Dixon: In 1946, counsel?

The Witness: Correct.

Mr. Strachan: That's right. That was a part of the debt which in 1949 was forgiven.

The Court: The objection is sustained on the ground of remoteness. The question relates to 1946. You may show any matters concerning the $38,000, but I don't think there is [1267] any necessity to go into component parts of it. We are concerned with happenings in the year 1951, and particularly those events immediately preceding it.

Mr. Strachan: I would like at a later time to be able to make an offer of proof, your Honor.

The Court: All right.

Q. (By Mr. Strachan): Mr. Winckler, the forgiveness of that 38,000 some odd dollars of your indebtedness to the corporation was a loss to the corporation, and income to you, was it not?

A. I believe, counsel, I explained it at length yesterday, but I like to answer the question again. As far as the $38,000 is concerned, we have to divide that amount in two separate parts. The $11,000, or, rather, $10,000, which was supplied by Mr. Rubin in 1949 and paid over to Bernard J. Smith to acquire his stocks, that was a transaction in 1949.

If we deduct $10,000 from the 38,000, we have a balance of 28,000 left. This $28,000 was drawn by

(Testimony of Nicholas J. Winckler.)

me according to my best belief as part of a bonus arrangement that I had with the corporation way back in 1946.

So I don't believe that the amount of $38,000 should be handled as a lump sum.

Q. Wasn't the forgiveness of that $38,000 income to you in the year 1949?

A. The forgiveness—— [1268]

Mr. Dixon: I object to the question, your Honor. It calls for a conclusion of the witness and is a tax question, which is wholly irrelevant and immaterial to the issues of this case.

The Court: Sustained.

Q. (By Mr. Strachan): Isn't it a fact that before the referee you testified that the $38,000 of forgiven indebtedness was income to yourself?

Mr. Dixon: Same objection, your Honor.

The Court: In 1949?

Mr. Strachan: Yes, sir. No, his testimony is in 1952, that the forgiveness in 1949 was income to him.

The Court: In 1949?

Mr. Strachan: Yes, sir.

Mr. Dixon: Same objection.

The Court: Objection sustained. You don't contend he got this $38,000 in cash?

Mr. Strachan: Yes.

The Court: In his hand?

Mr. Strachan: Yes.

The Court: You may ask him if he did.

Mr. Strachan: A part of it, of course, was the

(Testimony of Nicholas J. Winckler.)

transaction by which he got the 60 shares of stock from Mrs. Campbell which the corporation paid for. That was one of the items that make up the 38,000. He got this stock and the [1269] corporation paid for it.

The Court: My question to you was, you don't contend, do you, that he recived $38,000 in cash or in property in the year 1949. He has admitted that 28,000 of this was moneys drawn by him as bonuses, as he recalls, in 1946. He had admitted he got the money in 1946.

It is also in the record that in this bookkeeping long explanation, which I will not go into, that it was crossed off the book.

Is it your contention there was physical delivery of $38,000 in money or stock to him in 1949?

Mr. Strachan: It is my contention that in 1946 he didn't get this money as a bonus. In part, he got it through having the corporate funds used to purchase the stock from Mrs. Campbell, which he personally took. It was his borrowing to say the best, of funds.

The Court: In other words, the contention is he got the stock in his own name in 1946.

Mr. Strachan: That's right.

The Court: And that the money for that stock, that he paid for that stock was charged to his account and was part of this 38,000?

Mr. Strachan: That's right.

The Court: That was in 1946?

Mr. Strachan: That's right. [1270]

(Testimony of Nicholas J. Winckler.)

The Court: Why not bring it down to date? What is your contention in 1949? What did he get in 1949?

Mr. Strachan: That item, together with $6,000 from the 10,000 that he says went to Smith and was received by himself, that he took that stock. In the aggregate, all of these items add up to $38,000, so that in the period from 1946 down to 1949, he had taken from the corporation or had applied corporate funds to acquire stock of an aggregate amount of $38,000, which was carried on the books, and then in 1949 they wiped the slate of all these transactions that go back to 1946. That resulted in lessening the corporate assets by $38,000, and resulted in his having enjoyed comparable income in 1949, and he so testified before the referee.

The Court: Comparable income in the sense of a credit on the books?

Mr. Strachan: No. Forgiveness of an indebtedness is income in the year in which the forgiveness occurs. [1271]

Mr. Dixon: If the court please, I wish to again renew my objection to this line of inquiry on the ground that it is wholly irrelevant and immaterial to any of the issues of this lawsuit. This is not a stockholders lawsuit, or Sunkist is not a stockholder in this corporation. This is not an action by the trustee for recovery of money that allegedly may be due, if there was any due. This is an entirely different proceeding, and I think this line of questioning has no bearing upon any of the issues of this case,

(Testimony of Nicholas J. Winckler.)

except to the extent that possibly it might show, if true, that some of the statements in the balance sheet were incorrect, and that is for the jury to decide.

Mr. Strachan: It goes further than that, if it please the court——

The Court: Haven't you proved the ultimate fact that you say you are trying to prove, namely, that $38,000 was crossed off the books in 1949?

You have already proved that.

Isn't that your ultimate fact?

Mr. Strachan: That is one of the important facts. But there are other subsidiary facts which I should be allowed to go into. I should be allowed to show, for example, that behind that $38,000 was not this involved bonus arrangement that was talked about. It was actually the use of corporate checks to buy stock for Winckler personally. [1272]

The Court: I don't know whether counsel can get together on some stipulation as to these ultimate facts. I am not prepared to say at this time whether you should go into it. If you do go into it, for the purpose of our colloquy here in the presence of the jury, I am going to advise the jury that this is not a stockholders suit, this is not a suit charging misconduct against some officer for appropriation of funds; that the only issue at all on which this matter would be pertinent is the question of what was this corporation like in 1951—in other words, what was its worth, what assets did it have, was it a going

(Testimony of Nicholas J. Winckler.)

concern, was it a hollow shell, did it have assets and what were they, and so forth.

You have already proved and have in the record that $38,000 of assets that appeared in the books as a debt due from Winckler were in that year crossed off, and therefore the books of the corporation showed that $38,000 less in assets following that transaction in '49.

Mr. Strachan: It is more than just a bookkeeping transaction, because one of the questions here is why did the company fail in business.

I think, clearly, if a stockholder withdraws $38,000 of assets that were supposed to be devoted to the business, and applies them to his own personal uses, that that bears very directly on one of the reasons why the corporation went [1273] broke.

Mr. Dixon: If the court please, I think this has already been in the record and the record shows that this witness testified that this money was secured from the corporation for bonuses back in 1946, and not subsequent to that time.

I renew my objection, again, on the grounds previously stated.

The Court: The objection will be sustained until at least we can hear your offer of proof and go into the matter further.

Mr. Strachan: All right.

Q. (By Mr. Strachan): I believe, Mr. Winckler, you testified that you had complaints against the Winckler & Smith products, that those related only to the navel single strength juice—is that correct?

(Testimony of Nicholas J. Winckler.)

A. It is not.

Q. Well, did you have complaints against other of your products?

A. I think the record will show that I said that Mr. Finley had a complaint in 1947 on certain concentrate that we were producing for him.

Q. Oh, yes, I remember that. But I mean complaints from your brokers or customers.

A. The record shows what I testified and according to [1274] my best recollection what I said.

Q. Do you recall some complaints against the so-called Citrus Cocktails which were sold under the Anagold brand name?

A. Which year; from whom?

Q. At any time.

A. Well, counsel, Citrus Cocktail was produced first almost 10 years ago. You have to help me, if you want from me an answer on that. After all, this isn't a memory contest.

The Court: Also, to recall what we had here on direct, he said there had been complaints occasionally from some customer, that is, the ultimate customer, in which event they had sent back cans.

I think your question should specify whether it is from brokers——

Mr. Strachan: Brokers.

The Court: ——or people they wholesale to, or from individuals.

Q. (By Mr. Strachan): Do you recall if any brokers complained against the Anagold blended juice at any time?

(Testimony of Nicholas J. Winckler.)

A. It is probable, if it was blended juice made with navel, I think I testified so before.

Q. You testified that for the most part you did not use navel juice in blends, didn't you [1275]

A. No. I testified just the opposite way, that I used navel for blended juice, and sometimes straight navel juice.

Q. Did you use any navel juice in the blends in 1947? A. It could be. I am not certain.

Q. Who was the Davenport Brokerage Company of Davenport, Iowa?

A. The Davenport Brokerage Company was one of our brokers, and it is identical with the Davenport Brokerage Company whose letter I read yesterday in the record, which is giving us a very fine pat on the back. "There are not very many firms who would have"——

The Court: Just a minute. The question was who were they. Go on.

Q. (By Mr. Strachan): Do you remember a letter they wrote on July 20, 1949, complaining about some Anagold blended juice that they sold for you in 1947? A. Yes. If I may explain that.

Q. Let's get the letter first.

I will ask that this facsimile of a letter addressed to Winckler-Smith on stationery of Davenport Brokerage Company, bearing the Winckler & Smith received stamp July 23, 1949, be marked for identification.

The Clerk: Defendants' Exhibit M for identification.

(Testimony of Nicholas J. Winckler.)

The Court: Exhibit M. [1276]

(The exhibit referred to was marked Defendants' Exhibit M for identification.)

Mr. Dixon: May I see it?

(Mr. Strachan handing exhibit to Mr. Dixon.)

Q. (By Mr. Strachan): Do you recognize that letter as one you received in the ordinary course of business? A. Yes; I do.

Q. There is no indication there that that has any reference to Valencia juice, is there?

A. Well, you have to give me at least five seconds to read it.

Q. Pardon me.

The Witness: May I ask, if the court please, that I explain that in my own words?

The Court: Well, just a minute. Is there a question pending?

Q. (By Mr. Strachan): The question is, there is no indication that that relates to Valencia juice?

A. There is no indication one way or the other way.

Q. All right. A. I like to explain.

Mr. Strachan: Let me read this letter first, and then you explain.

The Court: All right. Well, wait a minute. You have to offer it in evidence. Do you offer it? [1277]

Mr. Strachan: I am offering this as impeaching his statement that there were no complaints.

(Testimony of Nicholas J. Winckler.)

The Court: This is just a technical matter. If you are going to read it, you have to offer it in evidence.

Mr. Strachan: I might just as well be nontechnical and say I will offer it in evidence.

The Court: All right. Exhibit M received in evidence.

(The exhibit referred to, marked Defendants' Exhibit M, was received in evidence.)

The Court: Now you may read it.

Mr. Strachan: "Dear Mr. Winckler:

"If you will check back, on the last sales that we made in 1947 for your account"——

The Witness: Pardon me. Will you state the date of the letter?

Mr. Strachan: Thank you, Mr. Winckler. This letter is written in July, 1949.

Mr. Dixon: What is the date in July?

Mr. Strachan: July 20th, and it was received on July 23.

"If you will check back, on the last sales that we made in 1947 for your account was some Anagold blended juice with lemon added to Smith Brothers & Burdick Company, Davenport. Smith Brothers & Burdick Company have had trouble with [1278] this juice from the day it arrived. They have sent the merchandise out and it has been returned so often that the cases are practically worn out and those cases that are not worn out, the cans have

(Testimony of Nicholas J. Winckler.)

swelled and blown up all over the merchandise so that it is one grand mess.

"They advised yesterday that they are going to truck the whole mess down to the city dump and junk it and they wanted to know how we wanted it handled. They feel that they are entitled to reimbursement for any unsold portion which they may have on hand and which they may be forced to junk. Kindly advise.

"Yours very truly,

"DAVENPORT
BROKERAGE CO.,
"By J. H. SCHMELTZER."

Q. Is that the same Schmeltzer that wrote that letter you referred to yesterday?

A. That is the exact Schmeltzer.

The Court: All right, you may explain.

The Witness: In the first place, I like to refer that the merchandise in question was packed in 1946. It is identical with the 280 or 86,000 cases that counsel mentioned yesterday that we packed so much citrus cocktail, and so much was sold. It is all in the record.

Some of the citrus cocktail was sold as citrus cocktail, [1279] I believe I explained that as citrus cocktail. I believe I explained that citrus cocktail differs from blended juice by adding a little lemon juice to it.

Another part of the inventory was sold as blended juice with lemon added, just giving it the name.

(Testimony of Nicholas J. Winckler.)

So when this letter was written by the Davenport Brokerage Company, the merchandise was three years old. I think if counsel will check with the Canners League of California, or the National Canners Association, it is usually not customary to guarantee merchandise beyond one year. Some people guarantee merchandise only for six months.

In 1947, we got complaints, a great deal of complaints in connection with various sales that we made.

When I testified that we haven't received any complaints except for as I testified, I referred to quality complaints, and I didn't go back beyond 1949 for the following reasons.

The court will remember that I testified about the break in the citrus market in 1946. By the end of 1946 and 1947 the whole grocery trade, coast to coast, wanted to get rid of citrus juices, want to return citrus juices, with all kinds of legitimate and illegitimate opinions. The trade got stuck with $5 and $5.50 merchandise that they couldn't sell for more than $2 a case. The trade lost $3.50 and, of course, the food trade did the best to get rid of the merchandise or get what it is called price protection, which [1280] means refund of the difference between the present price and the price it was sold.

The fact that Smith Brothers had merchandise on hand in 1949, which they bought two years before in 1947, proves that due to the drop in price, they couldn't sell it.

So I think that explains the situation about com-

(Testimony of Nicholas J. Winckler.)

plaining. That complaint is entirely unfounded and the merchandise cannot be good and palatable in 1949 which was packed in 1946, and mainly in a hot state like Iowa, where the temperature goes very high during the summer months and it is kept without refrigeration.

Q. Do you remember that your broker, Schmeltzer, said that the Smith Brothers & Burdick had had trouble with the juice from the day it arrived?

A. Well, the broker usually represents the buyer, because that is where his income comes from.

Q. You pay him a commission, don't you?

A. Well, yes, but the brokers have to serve the buyers, because the buyer is always king.

Q. The buyer is what?

A. King. Pardon me for my colloquial language. Without the buyer, there is no sale, and without the sale there is no brokerage.

So it is usually the buyer's market. That is the term that is used in the industry, in the food industry. [1281]

Well, if we wouldn't have taken care properly of our buyers—you cannot satisfy everybody all the time. The same Davenport Brokerage Company wouldn't have written six months later a letter which is the biggest compliment.

The Court: All right. You read that letter.

The Witness: That is all I have to say, your Honor.

The Court: All right.

Ladies and gentlemen of the jury, we are to take

the noon recess. The court will take up earlier, but the jury will be excused until 2:30 this afternoon. Remember the admonition of the court. You will now be excused.

(The following proceedings were had outside the hearing and presence of the jury):

The Court: The record will show the jury absent. Is there any possibility that the defendants' accountant and the plaintiff's accountant can go over this matter of the $38,000 and break something down that could be used without having to go into the matter? As I see the matter, you have in the record there was a write-off of $38,000 in 1949. That is the ultimate fact. I am going to hear you this afternoon on an offer of proof.

But what I think you are going to offer to prove is how this figure was built up, and you have already told me some goes back to 1946, where apparently, whatever Winckler got, he was charged with some money, and other things happened, he [1282] kept being charged with this money until eventually the account showed $38,000.

The ultimate fact is, and the thing you want to rely on, as you have told me, that the corporation lost $38,000 in 1949 and that was crossed off. That is the ultimate fact. Whether it is going to move this case along to go back and prove what the $38,000 was made up of is pretty hard for me to say.

If the corporation lost assets, the loss is not what built up the $38,000. The loss was the crossing off of $38,000.

Mr. Strachan: So far as the composition of the total sum is concerned, I don't think we will have any difficulty with the plaintiff. Mr. Walker is fully familiar with the thing, and I think if our accountants were to set up a statement based on their analysis of the books as to what the components were, Mr. Walker would agree to it.

The other matter as to which I intended to offer proof was to show the origin of the debt was not what Mr. Winckler said it was. It was not a bonus.

The Court: In other words, you want to rely on the bad boy statute. You want to show Winckler was a bad boy and took money from the corporation.

Mr. Strachan: Well, it goes a little further than that.

The Court: How does that have any bearing on the issues [1283] of this case? He could have been a thief and took this $38,000 day by day in thefts, and it would be charged up against the corporation. The ultimate fact is that it was crossed off in 1949.

Now, just because you want to use the bad boy statute against the witness, that doesn't always follow that you can. [1284]

Mr. Strachan: No; but there is another aspect to it, too, judge.

Winckler has testified that as part of the deal when Rubin came in that Simth was to get $40,000. In the days when they were adversaries, Mr. Irwin and Mr. Walker did a very thorough job before the Referee showing that there was no such agreement, that there was no escrow here of $10,000 payable to

Smith. Actually Smith got only $4,000 and Winckler got the balance.

The Court: I am not going to stop you from proving your ultimate facts, but I have serious question as to whether these——

Mr. Strachan: I can make a short offer of proof.

The Court: Whether these build-up things are important. If you want to use them for impeachment, then they become collateral issues. It wouldn't be impeachment on material issues in the case, and it is a recognized rule of law that you can't fish something up that is collateral and put it in a posture, then, to impeach the witness on some collateral matter.

Mr. Strachan: I didn't raise it. It was raised by Winckler's redirect, so to speak, when he was making his explanation.

The Court: I don't care who raised it. The rule is you can't impeach on a collateral matter. So the question [1285] arises, is it a collateral matter or a material matter?

You say to the witness, "Isn't it a fact that on such-and-such a day you tipped your hat to a lady along the quarry?" It doesn't make any difference whether he did or not, and you, therefore, can't impeach on it.

Now, let's assume that Winckler claimed there was an escrow for $10,000 and you claim there wasn't, and that Mr. Walker or Mr. Irwin proved there wasn't—is that an ultimate issue in this case? Is it any material issue? The ultimate facts that money came into the corporation or went out of the

corporation can be shown, but I don't think I am going to sit and hear testimony as to why certain items were charged to Winckler.

In other words, you say $38,000. Supposing you could prove that some of it was stock that he took in his name and his account charged, some of it was advances of some kind, some of it was checks he just wrote, but eventually it was $38,000 charged on the books, and it is crossed off—for the purpose that you are trying to prove, the only material thing is that $38,000 in assets was crossed off.

If we went into every collateral issue to try to show what happened in '46, whether he took a ten dollar bill out of the till, and whether he told his partners before the corporation was formed that he had taken $10, and after the corporation was formed what he did with $50, here and there, it [1286] wouldn't advance this case any, except to prove that Winckler is a bad boy.

That isn't the way you are going to prove Winckler is a bad boy, and that isn't a proper way to prove this case.

Mr. Strachan: I don't think that what I will offer will be comparable to the snitching of ten dollars or stealing from the stamp drawer, or anything of that sort.

I would suggest, your Honor, over the lunch hour I try to work up a succinct statement——

The Court: All right. Let's assume that you have proof to show that Winckler was a thief, do you think it would be material in this case?

Mr. Strachan: Thief from whom?

The Court: From his own corporation, from his shareholders, do you think it would be material to prove that in this case?

Mr. Strachan: That he stole corporate assets?

The Court: Yes.

Mr. Strachan: Yes.

The Court: How? Can a thief be hurt by an illegal conspiracy——

Mr. Strachan: A thief from his own corporation.

The Court: If you can prove what was stolen diminished the assets of the corporation so that it had probative value on what this corporation was in 1951, all right. But merely [1287] because Winckler might be a thief, you can't go back and offer proof to show that he was a thief in '46 and '47 and '49. That is what we call the bad boy statute. You are just trying to make somebody a whipping boy on the theory that it will in some way influence your case.

I think that you are entitled to show what this corporation was in '51. Was it a hollow shell, did it have $700,000 in assets, or did it have fifty, was it a going business, what were these assets worth, as bearing on the question and solely on the question of were they damaged. It has nothing to do with whether or not defendants violated the antitrust laws. We will concede that, is that right? But it does bear definitely on the question of damages.

Mr. Strachan: It bears on more than damages.

The Court: What does it bear on?

Mr. Strachan: It bears on the question of why he

went broke. It bears on the question of causal relationship.

The Court: I will amend my statement, damages and causation.

Mr. Strachan: That is right.

The Court: Because your defense is, first, you didn't damage him——

Mr. Strachan: And, second, that he put himself out of business.

The Court: ——and, second, he went broke himself. [1288]

Mr. Strachan: That is right.

The Court: But you don't prove that by proving he was a bad boy in '46 and '47.

Mr. Strachan: I will try to come in with a succinct offer of proof, and I don't think we ought to let our blood pressures go up.

The Court: Okay. [1289]

* * *

Mr. Strachan: May it please the court, so far as the subject of the makeup of the $40,000 indebtedness which was forgiven, we will have our accountants work up a schedule showing what we understand it to be, and see if we can't have an agreement on it. So at the present time I won't pursue that.

Now, in regard to the facts as to the purchase of the B. J. Smith stock, Mr. Winckler testified in this proceeding that there were two escrows opened. One was $40,000, which went to complete the reorganization. The other was $10,000 in a separate escrow which he said was earmarked for the purpose of

acquiring Bernard J. Smith's stock. He also testified that Rubin committed himself to pay $40,000 to the corporation. The $10,000 was a separate deal. In order to pay the $40,000 to the corporation, he said, "I am going to pay into another escrow $10,000 earmarked for the sole purpose that Smith is going to be bought out from the business."

The facts as we understand them are that the agreement as it appears in the Winckler-Smith corporate minutes was an agreement of January 27th between the company and Rubin which provided to set up escrow No. 1 which called for [1290] the payment of $40,000 to Lynch as receiver upon the compliance with specified conditions, and the other escrow provides the escrowee should, under specified conditions, pay over and deliver to the corporation said executed lease and said $10,000 in cash.

Now, neither of these escrows mention Bernard Smith.

If the witness were to testify to any other set of facts than these, then I would want to refer to his testimony in the proceedings before Referee Head, which contains the following at page 50, beginning at line 7:

"And you believe, also, that there was a provision in the escrow instructions for the payment of that $10,000 to Smith?

"Yes; I believe so.

"I hand you a copy of the escrow instructions which have been furnished me by the bank, which are the instructions in escrow 2, and point out

wherein there is any reference to Smith in these escrow instructions.

"A. Well——

"Q. Do you find anything there?

"A. No; I do not."

That's all I had in mind on that subject. [1291]

The Court: We will see if there is some objection here.

Mr. Dixon: I am sorry, your Honor. Pardon me.

The Court: There has been an offer of proof made. You heard it, I suppose?

Mr. Dixon: Yes; I did, your Honor. I certainly fail to see any relevancy to the offer of proof as made. I still think the objection to it is sound.

The Court: Do you object?

Mr. Dixon: Yes; I do, your Honor.

The Court: The objection is sustained, and on this ground: The offer that you have made indicates that there were apparently two escrows. Now, you want to show that the situation as to these escrows was not exactly as Mr. Winckler said it was. Is that right?

Mr. Strachan: That, and——

The Court: That is clearly a collateral matter. If we go into that, we have to go into the escrow instructions, we have to go into all the things to find out what the escrow provided, how they were handled, and one thing and another. It is entirely a collateral matter. It has no bearing on the issues of the case and it is one of those things that if multiplied it could prolong lawsuits forever. That

is why we have the rule here that these collateral matters cannot be gone into.

And if it is for the purpose of impeaching [1292] Winckler, again it is impeachment on a collateral matter.

I don't think there is any sound basis for admitting them.

There is no dispute that certain money came in, which is the ultimate fact. There is no dispute that Smith went out. And how the escrows were handled and what Winckler said about them will assist this jury not at all.

Mr. Strachan: In my opinion, your Honor, it shows something more than that. It shows there was a diversion of $10,000, which under the terms of the contract of the escrow was to be applied and paid to the corporation, that was diverted from the corporation to Mr. Winckler personally.

The Court: You can show what money went into the corporation, you can show what money went out, you can show what assets this corporation had. As to who it went to and how the escrows read, and how it was worked out, is not material.

Suppose he stole it, suppose he wo ed out some fancy deal that he stole it, if you pr that it went out of the corporation, haven't you roved all you are entitled to?

Whether Winckler is a thief is not an issue in this case.

You are going to be permitted to show what assets this corporation had, that it crossed off $38,000 in assets; you are going to be able to show

what you think the value of its [1293] fixed assets were, and various things that are claimed as assets; but you are not going to go into the history of how these things came about, even if it is shown that Winckler is a bad boy.

Supposing you had a case where some transaction would prove his inability to run a citrus plant, that might be closer to the mark, but if I understand what you are talking about, it doesn't concern that at all. It would concern his ability to sneak out $10,000. That is not an issue in the case. [1294]

* * *

NICHOLAS J. WINCKLER

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, I show you Defendants' Exhibit N for identification and ask you if you recognize that as a letter received by you in the ordinary course of business? A. May I read it?

Q. Surely. [1296] A. Yes.

Mr. Strachan: I will offer it in evidence.

Mr. Dixon: No objection.

The Court: Exhibit N received in [1297] evidence.

* * *

(Testimony of Nicholas J. Winckler.)

Q. Mr. Winckler, when you packed navel juice under the Anagold label for buyers who wanted it packed that way, you realized, did you not, that you were risking the value of the Anagold name?

A. Is there any connection between these questions and what you asked before, or you are not interested in my opinion in regard to the Memphis letter? I mean I wasn't asked what my opinion is about the Memphis letter.

Q. No. I thought Mr. Dixon would do that on redirect.

A. I see. Pardon me.

Mr. Dixon: I will take care of it. [1299]

Q. (By Mr. Strachan): You realized, did you not, when you packed navel juice under the Anagold label that you were risking the good name of Anagold? A. Well, I think——

Mr. Dixon: If the court please, I object to the form of the question unless it is connected up to something. It is entirely too general in nature.

I frankly don't understand the question, myself. Maybe the witness does.

Mr. Strachan: The witness testified that he preferred to pack navel juice under Anapride, so as to protect the good name of his Anagold label. Now, I am asking him whether he didn't realize at the time that he packed navel juice under Anagold that he was risking the value of the Anagold name.

The Court: The objection is overruled. You may answer.

The Witness: I believe that my testimony in that

(Testimony of Nicholas J. Winckler.)

matter answers your question. I said that I preferred to pack under other label than Anagold label. Why would I prefer, unless I realized that I would risk the name of the Anagold label if I packed merchandise which is second grade or not up to the Anagold standards?

Mr. Strachan: I will ask that this letter, copy of a letter written by Winckler & Smith Citrus Products Company to Russell Brokerage Company, of April 4, 1949, be marked as an exhibit for identification. [1300]

The Court: Exhibit O. [1301]

* * *

Q. (By Mr. Strachan): Do you recognize that as a copy of a letter sent by you on or about April 4, 1949, to the Russell Brokerage Company at Oklahoma City, Oklahoma?

A. Yes; I do. Let me read the letter.

The Court: Just a minute. You have just been asked one question, and counsel has indicated he might have an objection.

You say you recognize it?

The Witness: I do.

Mr. Strachan: I offer it in evidence.

Mr. Dixon: I object to it on the ground that I don't think it has any relevancy or materiality to any of the issues in this lawsuit.

Mr. Strachan: It is the second paragraph that I had in mind reading. [1303]

The Court: The objection is overruled. However,

(Testimony of Nicholas J. Winckler.)

the next to the last paragraph has no pertinency.

Mr. Strachan: No. I didn't intend to have any reference to it.

The Court: You may read any other part you want to. Received in evidence as Defendants' Exhibit O.

Mr. Dixon: Is the entire document in evidence, your Honor?

The Court: Well, wait a minute. We can't receive it and put a limit on the paragraph. Let me see it again.

Well, you can either cut the paragraph out of the letter or I will set aside my order admitting it, and you may read such parts as you want into the record and not use it as an exhibit. Which would you rather do?

Mr. Strachan: I have offered the document as a whole, but in view of that limitation——

The Court: You are not offering it for that paragraph I referred to?

Mr. Strachan: Not for that paragraph, but I don't think that paragraph renders the document inadmissible.

The Court: No; but I suggest one of two alternatives, that we eliminate the paragraph, or that we read the document into the record eliminating that paragraph. Then you won't need it as an exhibit. It wouldn't be an exhibit then and you would just read the letter into the record.

Mr. Strachan: As to the document as a whole, then, [1304] you sustain the objection?

(Testimony of Nicholas J. Winckler.)

The Court: No. I am suggesting a couple of alternatives. You have situations come up all the time, counsel, where some document is presented—that isn't the case here, but, for example, somebody has put some scribbling along the side and nobody can identify it. Then you have a question of a stipulation of counsel that a certain part be ignored or it is clipped off, or it is covered up with a piece of paper pasted thereon. There are a thousand and one ways to take care of a situation like that.

Mr. Strachan: I would agree if there had been an alteration of the document, but this is a document which the witness has testified was sent by him in due course, and I think the entire document is admissible.

The Court: You apparently now are expressing more interest in the paragraph than you did before. I think it has nothing to do with the case. You can read the whole letter. I will let my order stand. It is received in evidence. Objection overruled.

(The exhibit referred to, marked Defendants' Exhibit O, was received in evidence.)

The Court: Read all or any part of it.

Mr. Strachan: I will read only the second paragraph. This is a letter dated April 4, 1949, written to Russell Brokerage Company at Oklahoma City, signed by Nicholas J. [1305] Winckler, president.

"I doubt that we will do anything on navel juice. We want to be more careful then ever before as far

(Testimony of Nicholas J. Winckler.)

as quality is concerned, and we are afraid it would be a mistake to pack navels."

The Court: May I have the letter, Mr. Clerk?

It is in evidence now, so I will read the paragraph about which the discussion occurred.

"As far as the loss is concerned that you may suffer by receiving dividend on your old balance, all brokers agreed enthusiastically to accepting our proposition to pay one extra payment on future business until such time as such loss is completely absorbed."

I didn't want you to think there was any great mystery about the paragraph about which the discussion occurred.

Mr. Strachan: Did your Honor say that the letter read one extra payment or one extra per cent?

The Court: I said payment.

Mr. Strachan: Yes; and the text of the letter is per cent.

The Court: You are right.

"* * * all brokers agree enthusiastically to accepting our proposition to pay one extra per cent on future business until such time as such [1306] loss is completely absorbed."

Thank you, counsel.

Mr. Dixon: Your Honor, may counsel approach the bench?

The Court: Yes.

(The following proceedings were had at the bench outside the hearing of the jury.)

Mr. Dixon: I was going to suggest, your Honor, that if counsel will give us the letters, if there are going to be very many of them, we can take a short recess and save a lot of time. That is just a suggestion, if you have any more of them.

Mr. Strachan: Well, I think I have something like—it won't take but a minute to look.

The Court: All right.

Mr. Dixon: I am just making the suggestion for whatever it is worth, because I have no idea how many of these they are going to use. Do you have many more of them?

Mr. Strachan: I have 25 or 30. I intend to read excerpts from most of them.

Mr. Dixon: Then I would suggest by all means that we have a chance to look at them.

The Court: Do you want to go on with something else or do you want to take the recess right now? Do you want to do it in the order in which you prepared your material?

Mr. Strachan: I would like to do that. [1307]

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Ladies and gentlemen of the jury, you will be excused for a short recess. Remember the admonition of the court. Court will stand in recess.

(Recess.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Mr. Dixon: May it please the court, I think the suggestion I made perhaps bore fruit because I was submitted photostats of some 56 or 58 letters, which I understand counsel intend to offer into the record in this case. I have just had an opportunity, of course, to make a very cursory scanning of them.

I notice some of them appear to have things marked on the side. I mean the document, the original, has apparently been marked. These documents have been made available to the defendants. I don't know who mutilated the document or placed the marks thereon.

In many other instances the letters are letters which refer to previous correspondence between the parties. There is no way in which the correspondence can be tied in without having the previous letter.

Some of them are very general in their nature. They [1308] deal primarily with, as I have had a chance to scan them, with products other than single strength juice. There may be some of them within this group that deal with it, but they cover a period of apparently three years, from 1949 on.

Now, as I see it, the problem is one of evidence here. I am certainly not going to try this case, as far as the plaintiff is concerned, through correspondence files. If we are to go into these matters it is obvious that we would be here, and Winckler, the witness, would probably be on the stand, if we were to have to go into each one of these letters in an effort to discuss the contents thereof, or to ex-

plain the so-called alleged complaint, or to bring in other documents by way of subsequent correspondence with the same parties that might deal with the same question, it is obvious we would be here through 1956. [1309]

If counsel have complaints substantiated, it seems to me the proper way to show that is by having the witness here to testify to the complaint, rather than by correspondence, because that is the best evidence.

And on the ground, generally, at this time, that there is no proper foundation laid for these documents, that they are mutilated and incomplete, and would call for endless explanation by the plaintiff if introduced in evidence, and they are not the best evidence for which they are apparently being offered, the plaintiff enters a general objection at this time to all of the documents that have been submitted to us for inspection.

It may well be that there may be some here that can be utilized. As I have said, I have only had an opportunity to make a very cursory examination of them, but from the examination that I have made I am satisfied that even after an extended and further examination my position would still probably be the same, because I am not going to try this case on correspondence.

Furthermore, plaintiff regards this as wholly irrelevant and immaterial, because there has been no foundation laid by the defendants here for this kind of testimony or evidence, and certainly there has been no evidence here showing that the defendants had any knowledge whatever of any of the things

that are set forth in these letters of [1310] correspondence prior to the time of this lawsuit.

If I understand the purpose of discovery and the purpose for which this material was made available to them for inspection, it was so that if they wanted to follow through and bring in live witnesses to testify to apparently what these documents were supposed to cover, that they would have that opportunity to bring the witness in that could testify concerning the contents. In other words, it was my understanding that this material was made available to counsel for the purpose of furnishing them with leads, if they wanted to follow them through. And they are certainly not competent evidence.

The Court: What probative value do you contemplate these letters would have?

Mr. Strachan: I think these letters would show a great many things. One, that contrary to Winckler's broad statement that they had an excellent product, it was generally found to be objectionable, and that the trade did not accept it, and that customers were dissatisfied.

The Court: All right. One, that the product was inferior.

Mr. Strachan: Yes. And others of the letters will show that contrary to Mr. Winckler's statement that there was good will attached to the Anngold label, as a matter of fact it will show that the Anngold label had no value, but [1311] was a detriment to sales.

The Court: The value of the label, what people thought about the label?

Mr. Strachan: That is right.

The Court: Is that what you expect to prove by these letters?

Mr. Strachan: That is one of the things.

The Court: What do you say about the hearsay objection?

Mr. Strachan: I say that Mr. Winckler has testified here that the only complaints he ever received were with respect to the navel juice.

The Court: Plus customers. He testified that he had numerous complaints from customers, the ultimate receivers, to whom he had always sent cases of juice.

Mr. Strachan: I don't think it was limited to that. That he never received complaints about his product except with respect to navel.

The Court: Mr. Strachan, I won't argue that with you. Look at the record. You recall him telling about occasions where, not one of his customers, but a consumer, would get juice that they were dissatisfied with, and he would send cans of juice. So your statement is too narrow. But go ahead.

Mr. Strachan: Furthermore, he testified that in his [1312] administration, whenever there were complaints against quality of product, or anything else about his organization, all of the correspondence came to him personally.

The Court: Suppose it did, how does that have any impact upon the hearsay rule?

Mr. Strachan: I think when he testifies that he hasn't had complaints, he has seen all the letters, and you show the complaints, I think even without that

testimony these letters would be admissible to show that the customers complained that the quality was bad.

Now, so far as Mr. Dixon claiming surprise——

Mr. Dixon: Oh, no, your Honor——

Mr. Strachan: ——I might say——

The Court: I haven't heard any claim of surprise. A complaint that he didn't know what these letters were, but not in the sense of surprise.

Mr. Strachan: My suggestion is, your Honor, that instead of trying to rule in advance on the whole group of documents, that we take it a step at a time.

The Court: How long do you contemplate that your cross-examination of Winckler will take to conclude?

Mr. Strachan: I think if it is not interrupted, not more than a day beyond this. I would hope that it would be that. It might run over a little while.

The Court: Well, obviously, I can't rule on a pack of [1313] letters that I haven't seen. On the other hand, if what you offer these letters for is what you say you offer them for, to prove poor quality of goods and poor value of a trade name, I think the objection is well taken.

Mr. Strachan: Let's take it an exhibit at a time, possibly.

The Court: We could take one or two up as a pilot case, and then make some offer of proof as to the rest, but let's not take the time to go through one at a time. Let's find out what we have got.

You know there was an old Roman by the name of Martial, and he wrote certain epigrams. One of them was about a lawyer whose name was Postumas. He had hired this lawyer to defend him in a case where his neighbor had charged him with stealing three goats. So after the trial went on a ways the Roman citizen pulled his lawyer's coattail and he said, "Sir"—I wish I could quote it verbatim.

I think it is worth quoting. Just a minute.

After the trial proceeds a while, he pulls his lawyer's coattails and he says, "Sir, my suit has nothing to do with assault or battery or poisoning, but it's about three goats which I complain, have been stolen by my neighbor. This the jury desires to have proved to them, but you, with swelling words and extravagant gestures, dilate on the Battle of Cannae, the Mithradatic war, the perjuries of [1314] the insensate Carthaginians, on the Syllae, the Marrii, and the Mucii. It is time, Postumas, to say something about my three goats."

Now, this case involves some nice issues in antitrust law. This case involves, probably, some points of first impression. Now, we have spent a lot of time today talking about the breakdown of a $38,000 item that was crossed off the books. Now, we have got a bunch of letters, many of which will be, probably, clearly within the hearsay rule, where somebody has made a complaint. How can the plaintiff cross-examine a letter that is offered? Somebody says, "Your stuff wasn't good," in the letter, how can the plaintiff cross-examine to find out if the man who wrote

the letter tells the truth? That is the purpose of the hearsay rule. [1315]

Mr. Strachan: This was the broker who was writing in the ordinary course of business.

The Court: Broker or consumer, what's the difference? He has made a statement. What is the purpose of the hearsay rule?

Now, we have got some nice points in this case, and I suppose that sometime we will get down to grips with the issues in the case.

Mr. Strachan: Your Honor, I think it was perfectly clear from the opening statement on behalf of the defendants that there were more than questions of law involved in this case. There are questions of fact, questions whether the public actually was ready to receive the goods. Whether the goods were good or bad may not be proved, but the evidence by these letters will show that the trade expressed dissatisfaction and was having difficulty marketing the goods.

Mr. Dixon: Well, counsel—pardon me. Have you finished?

Mr. Strachan: Yes.

Mr. Dixon: The record in this case thus far shows sales by the plaintiff corporation in all the products in excess of one and a half million dollars for the years 1949 and 1950.

Now, it seems to me that is entitled to some weight and consideration insofar as the public acceptance of the products involved in this case are concerned, particularly when it relates primarily to Valencia orange juice processed by this [1316] company,

which constitutes approximately 80 per cent of its products and sales.

Now, the plaintiff has some complimentary letters from consumers in these files, too, and those have been exhibited to counsel. I would not have the effrontery as a lawyer to present that kind of evidence to this court in support of any of the issues or allegations of this complaint.

The Court: All right. Let's take one letter here, February 2, 1950, and mark it Exhibit P for identification.

It will be stipulated, I take it, it came from the files of Winckler & Smith?

Mr. Strachan: Yes, your Honor.

Mr. Dixon: Yes, I will so stipulate, your Honor.

The Court: You offer it in evidence and then Mr. Dixon will make his objection and I will rule.

Mr. Strachan: I want the witness on the stand to identify the letter.

The Court: It has been stipulated it came out of the files of Winckler & Smith.

Mr. Strachan: May I see it?

Mr. Dixon: That is probably one of the worst, but that's all right.

Mr. Strachan: I was going to use this as one of a pair. I would like the two together.

The Court: All right. Let's look at the other one. [1317] The one I had is dated February 2, 1950, and the second is dated February 6, 1950, both from the same company, although with two different employees signing the letters. They may be both marked as Exhibit P.

(The exhibit referred to was marked Defendants' Exhibit P for identification.)

Mr. Dixon: What is the name of the company?

The Clerk: Pavey.

The Court: Are they offered?

Mr. Strachan: Yes. I will offer the exhibit in evidence.

The Court: What is the objection?

Mr. Strachan: I would like to have the stipulation go this far, that if they were presented to the witness he would testify, not only that the letter was from the file of the Winckler-Smith Company, but that it was received in the due and ordinary course of business and was brought to the attention of the witness, Winckler.

The Court: Will you so stipulate, Mr. Dixon? Read it, Mr. Reporter.

(Record read.)

Mr. Dixon: I assume that is correct. We will so stipulate, yes.

The Court: All right. What is your objection? Call the jury down and we will send them home and we will proceed with some of this. What is your objection? [1318]

Mr. Dixon: The exhibit is objected to on the ground that it is hearsay, incompetent, and on the ground that no proper foundation has been laid to the extent that any knowledge of the letter was in the possession or within the knowledge of the defendants prior to the time it was submitted to them under discovery proceedings.

On the further ground that it tends to throw no light upon any of the issues in the lawsuit, and the admission in evidence would deprive the plaintiff of the right of cross-examining and explaining any of the inferences and comments that are contained in such letter, a document that might tend to lead to the conclusion or inference that the product referred to in the letter was of the type that was sold by the plaintiff during the course of its business during the year in question.

And that it is not competent evidence and not the best evidence to prove that the product referred to therein was not good or up to the standards of the product that was put out and sold to the public in the volume and in the amounts in dollars already disclosed by the record in this case to have been sold by the plaintiff during the years 1949 and 1950, to which this exhibit relates.

The Court: The objection is sustained on the grounds stated, and on the further ground that going into the issues raised by this series of some 50 odd letters, of which this [1319] is the first exhibit marked for identification, would inject into the case interminable issues, and the case could never be completed.

On the further ground that the letters, at least the ones I looked at, refer to the bitter quality of the pack, which has been described as the navel juice, and the witness Winckler has already admitted he had complaints about the bitterness of his canned navel juice, and, therefore, it is not even proper impeachment evidence.

Mr. Strachan: I will ask that this letter dated March 22, 1950, addressed by Bagley and Company, Salt Lake City, Utah, to Winckler-Smith, bearing the received stamp of Winckler & Smith as of the date of March 23, 1950, be marked as an exhibit for identification.

The Clerk: Exhibit Q.

(The exhibit referred to was marked Defendants' Exhibit Q for identification.)

The Court: Now, just a minute. Bring the jury in.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Ladies and gentlemen, we have some other work to do, so I am going to excuse you. When you come back again it will be January, 1956, and it will be Tuesday morning at 10:00 o'clock.

The court wishes each of you a Happy Holiday and expresses [1320] that to you in behalf of counsel as well as the court.

Remember the admonition of the court. Do not discuss this case among yourselves or with anyone else or permit anyone to discuss it with you. Do not form or express any opinion on the merits of the case until it is finally submitted to you for your decision.

You will be excused until 10:00 o'clock January 3, 1956.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: As to Exhibit Q for identification, we have the same stipulation and the same objection?

Mr. Dixon: I believe so, your Honor. The same objection, your Honor, plus the additional objection that this letter does not even indicate what product is involved. Same stipulation, yes, your Honor.

The Court: Objection sustained.

Now, can we sort these letters out as to categories, or make an offer of proof on them, or what do you want to do?

Mr. Strachan: I would be willing to have your Honor make a suggestion as to the procedure. I think that they are so dissimilar, perhaps it would be well to give individual consideration, but if your Honor has concluded to rule in bulk on the letters——

The Court: First, I don't know how you can get away from the hearsay objection, no matter what the man may say [1321] in the letter.

Mr. Strachan: It is not hearsay, your Honor, and if your Honor's mind might be open on this——

The Court: What do you mean, it isn't hearsay?

Mr. Strachan: Correspondence received by a party to litigation in due course of business is not ordinary hearsay. At least, if it is dealt with under the hearsay rule——

The Court: It depends on what you are offering the correspondence for. If you are offering the correspondence for the truth of the statement contained therein, then it is hearsay.

Mr. Strachan: We are not.

The Court: Then you are playing horse with the court.

Mr. Strachan: No.

The Court: Because you just got through telling me that the purpose of the letter was to show that the trade considered this product inferior.

Mr. Strachan: That's right. We are not offering it to show that it was or was not. It is to show that it was not accepted by the trade. If your Honor would like to have us submit a memorandum or an organized argument on the thing, because I am quite surprised at this turn of events, I should be very glad to prepare a memorandum or more complete argument based on authority. [1322]

The Court: I see that a number of these letters concern navel orange juice.

Mr. Strachan: Well, as to that, your Honor——

The Court: They could be put in one category.

Mr. Strachan: It wasn't navel orange juice that I had in mind on that particular letter, I believe. It was this——

The Court: Which letter?

Mr. Strachan: These that refer to Anagold where navel juice was packed under the Anagold label are introduced for the purpose of showing that, among other things, the Anagold label value was impaired.

I haven't had time to review the transcript fully, but here is the sort of thing that Mr. Winckler testified to:

"Q. Did you keep in sufficiently close touch with what was going on in the plant so that if the laboratory records began to show product inferiority, that that would come to your attention?"

I am reading from page 1047 of the record beginning at line 11.

"A. Well, I did the best I could, but besides——

"Q. All right. Now, that is an answer to that one. Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention? [1323]

"Q. It definitely would have been, because if a broker is dissatisfied, he either would pick up the phone and call me from New York, or would write a letter. And there is one thing that I will state, that no single letter was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip, they kept the letters, the mail, for me, pending my return. But to answer the question completely, I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contained navel juice, or was pure navel juice."

The Court: All right.

Now, there are other things, too, but there is an admission that he had complaints on navel orange juice. Now, when you bring in letters, even if we look at them just as impeaching, or if you look at them as letters of complaint, without telling the jury what the contents were, where there is any reference

to the navel juice they are not impeaching. He has admitted that.

Mr. Strachan: But, on the other hand, I think we are entitled to show that because he packed inferior products, including navel, and Citrus Cocktail, under the Anagold label, that it did not have value, but actually it was a detriment to the product when it was put in the course of commerce.

The Court: Have you made any investigation of how many [1324] customers they had, how many consumers used this product?

Mr. Strachan: Not consumers. We have made some studies showing how many brokers they dealt with in a given year.

The Court: Here is one, for instance, that talks about buyers getting stuck with Anagold beverage bases. Unable to sell them at regular price.

What does that mean, get stuck, unable to sell them?

Mr. Strachan: It means that they couldn't be marketed at the prices for which they were held. The public wouldn't——

The Court: Does it mean they were inferior, or does it mean there was a price situation? What does it mean?

If you inject an issue like that in the case, then you have to find out how did the buyer get stuck. Did he buy more than he could sell in his community. did he buy a certain amount and some other product came out that undersold him?

He could get stuck a number of different way:

"Stuck" has several connotations, and you would get an issue in the case that there is no end to.

Here is another one of these: "Everyone who bought got stuck with it."

Mr. Strachan: It indicates the attitude of mind of the trade, that it was an attitude that was not willing to accept these products.

The Court: Do you think that a sheaf of letters would [1325] indicate the attitude of a trade in connection with sales as extensive as the evidence shows this plaintiff had?

Mr. Strachan: I think they are quite persuasive, and they certainly are in direct contradiction of Mr. Winckler's very broad testimony.

The Court: I have heard of provisions for sampling public opinion, and in unfair competition cases I understand that courts have admitted sampling of public opinion, but I never heard of sampling public opinion by going through the files and finding out what complaints were rendered, and then bringing those complaints in and saying this is a sampling of public opinion.

There is no mathematical basis to the number of consumers, to the number of dealers.

I think the best thing to do would be to turn the letters back to you. You will find, probably, that they fit in various categories.

Mr. Strachan: Your Honor, the difficulty with that—I tried to form categories of them and groupings of them, and I found that there was so much overlapping, letters dealing with several aspects of

the dissatisfaction, that I am convinced that you can't classify them that way.

I will do the best I can, but there will be some overlapping.

The Court: See what you can do with them, if you want [1326] to make your offers of proof.

And I will be glad to have any memorandum that you want to submit. I would be interested to see a case where you could prove general consumer dissatisfaction with a product by going into a firm's files and finding what complaints they received.

I will wager that there is no firm that does business but what you could go in their files and pull out a sheaf of complaints.

I would just like to make that as a little bet. With as good a product as Sunkist puts out, I will wager that you have complaints.

If that is the way you prove broker and consumer dissatisfaction, I would be very much surprised.

I would like to read a case on that. So you could present a little memorandum, and I will be glad to look it over.

Mr. Strachan: I might say that there are some more files at the office that I haven't had an opportunity to go through, and I may want to select some of those. If so, I will include those.

The Court: More files to similar effect as this?

Mr. Strachan: I haven't been over them yet. I don't know what they are.

Would your Honor care to suggest what sort of categories you would like to have me group these in? [1327]

The Court: Well, first of all, the navel complaints, I don't think you have got anything there, because there is an admission in the record that he had complaints on these navels.

In fact, the only navel juice that he sold, as I understand, that he didn't get complaints from was the carload to Canada. Apparently the Canadians like the bitter taste.

The second category would be these letters that are ambiguous, that you don't know what they mean. I just read two or three of them, where the dealer says he was stuck.

What does that mean? Stuck because it was inferior? Is that the inference you want to draw? Or was he stuck because he bought too much?

That demonstrates, of course, the reason why cross-examination is permitted, because if you called the witness here and showed him the letter:

"Did you write this letter?

"Yes.

"What do you mean by 'stuck'?"

You might get twenty different answers.

Mr. Strachan: I think that letter means that the broker, because of past experience with Winckler-Smith products had met with sales resistance.

The Court: Then to make any fair presentation to the jury, you would have to take a certain year—I am just [1328] pointing out some of the problems you have got—you would have to take a certain year and find out how many cases were sold, you would have to find out how many cases brokers bought, which would be probably the same as the amount sold, how many cases were involved in these com-

plaints. Now, when you got all through, if you had a percentage when you wound up that there was dissatisfaction with—let's take some hypothetical figure of one-half of one per cent—it clearly would not be proper evidence.

If your computation, when you got through, showed that there was a sizeable complaint, and if you got over the hearsay objection, you might have a different story. But to go through and pick out letters of complaint and to offer the letters as evidence that the product was inferior, and that the Anagold label had little value, and that customers, broker customers, had no buying interest in the product, I can't follow you.

Mr. Strachan: Let me say this: That we don't offer the letters that say the quality was poor, for the purpose of demonstrating or proving that the quality was or was not good. What we offer those for is to show that the broker and his trade were not accepting them, or were unwilling to accept the quality because of past experience. So far as the Anagold label is concerned, there is a showing in some of those letters saying it is a positive detriment. [1329]

"We won't buy any more of your product unless you take that label off and substitute another label."

That is a business fact. It is not hearsay. It is a customer saying to the man who is trying to sell them the product, "I won't buy that unless you give me a different label. I have had bad experience."

Now, that isn't hearsay. That is just a term of business contract.

The Court: But, Mr. Strachan, supposing you brought this witness in who wrote the letter, and you said to him—rather, the plaintiff said to him on cross-examination, "You have written a letter here. How many cases did you buy?"

"I bought three cases."

Or you might bring the man in and you might ask: "How many cases did you buy?

"We had five carload lots.

"What was this complaint about?

"This complaint was about five or six cases in the last carload."

You see how the facts that surround each of these transactions are necessary to understand what is involved?

Mr. Strachan: Perhaps I could put a hypothetical case that would illustrate what I have in mind.

If this were a suit in which Mr. Winckler claimed that by some defamation the defendant had prevented him from getting [1330] a contract, and the question of the defamation was in issue, but the defendant could come in and show that the person with whom he was contracting had, without regard to this supposed defamation, or this supposed other interference, written a letter saying, "I will not give you this contract unless you do thus and so," that letter, I say, would be admissible without more.

The Court: The letter was written to [1331] Winckler?

Mr. Strachan: If there were, yes. That would show what the state of mind of the other contracting party was, why he imposed certain conditions,

why he wouldn't take products with the Anagold label. He said, "Mr. Winckler, I won't take your product unless you put some other label on, I won't do business with you."

That's what we have.

The Court: Then the plaintiff is bound by that letter, without a chance to cross-examine that man.

On cross-examination he might say to this man, "Now, you say in your letter you won't take my product because it is inferior. Isn't it a fact, Mr. Jones, that it was only after the defendant told you what a louse I was that you wrote me this letter?"

He says, "Yes, that's true. He came in and told me what a louse you were. I didn't want to put that in the letter, so I just wrote the letter and said I wouldn't take the product."

That's the very purpose of cross-examination, to find out what lies behind statements.

There are other statements where the fact that a certain thing was done may be shown without regard to the contents of it, but that is far different from offering the letters. I don't know how you would handle that, or what issue it would pertain to. There certainly is no impeachment as far as [1332] navel juice is concerned.

I will see your memorandum and see what you can do to sort these out, and we will rule on some more of them.

Mr. Strachan: Where did we leave the record?

The Court: There were two offered and objection was sustained to two, P and Q.

I would like your memorandum to start out with a

brief discussion of what the probative value of these documents is, because in analyzing the admission in evidence I always find it helpful if you state what you contend the probative of this testimony is.

Mr. Strachan: To what are you directing it?

The Court: What is this going to prove? What do you want to prove and how does this tend to prove it? And then you look at the document. That little formula always helps me. I am not as smart or fast a thinker as some people, but that little breakdown very often helps in trying to determine whether something is admissible.

Mr. Strachan: We shall try to organize it in that way.

The Court: Bear in mind you have already stated what you intend to prove, but you may on reflection want to crystalize that or specify [1333] more.

* * *

The Court: Yes. I am just going to inquire, do you have this memorandum on this evidence question?

Mr. Fisher: We do have, your Honor. [1338]

* * *

Mr. Strachan: * * * Another matter that I wanted to mention was the stipulation which appears on page 997, I believe, of the record.

The stipulation that Mr. Dixon requested that I enter into as to the amount by which the purchase of 1400 cases of bright goods, as they are called, differed from the price at which TreeSweet, I be-

lieve it was, might have acquired the same quantity, as it appears in the transcript I think it might be misconstrued and be broader than I intend the stipulation to be.

It reads:

"May it be stipulated, counsel, subject to your check as to the figures, that for the purchase of the 1,000 cases of 12/46's and for the purchase of 400 24/2's by the plaintiff from Sunkist, at the prices specified in Plaintiff's Exhibit 49, that for the purchase by TreeSweet of the same amounts and sizes of orange juice there would be a difference of $404.76?"

I didn't intend that to be a stipulation that if TreeSweet had purchased as an isolated transaction those quantities of goods, that the price would have been $404 lower. It was my intent only to stipulate that in the event TreeSweet had [1339] taken down the same amount of quantities under this——

The Court: Contract?

Mr. Strachan: ——joint venture, it would have accounted, under the terms of that contract, for those quantities, which it might have sold at a price lower than this spot price that was quoted to Winckler-Smith.

Mr. Dixon: Yes, your Honor. I presume counsel is endeavoring to state his position that these were not sales or matters which go to, possibly, questions of law which may be involved in his defense.

The sole purpose of this evidence is to show that

the plaintiff paid the amounts specified in the exhibit for 1400 cans of single-strength Valencia Orange juice. The exhibits offered by the plaintiff showing the amounts billed or paid by TreeSweet during a comparable period per case indicate that had those prices been charged under the contract—and they were—that they would have paid that much less than the plaintiff paid.

The Court: But you are relying entirely on the contract transactions?

Mr. Dixon: Yes.

The Court: You are not reading into this stipulation anything else?

Mr. Dixon: No.

The Court: That is your point, isn't it? [1340]

Mr. Strachan: I just wanted to make clear to the court and counsel that we took the position that the two sales were not under the same or similar circumstances and weren't comparable.

I didn't want to be precluded from that contention by the stipulation.

The Court: All right. [1341]

* * *

The Court: The record will show the jury absent.

Mr. Dixon, have you looked over this memorandum?

Mr. Dixon: Yes, I have, your Honor. I am ready to comment on it at any time your Honor is ready.

The Court: Very well.

Mr. Dixon: May it please the court, the question

presented by the memorandum and now before the court relates to the admissibility in evidence of certain letters or copies of letters which were secured from the files of the plaintiff corporation. They are claimed to be admissible as evidence in this case under two theories: No. 1, to show the state of mind of the person from whom the document was received or sent and, second, to impeach the testimony of Mr. Winckler.

Now, there isn't any question in my mind, and there isn't any question about the law as to the admissibility generally of statements of declarants to indicate a state of mind.

I submit, however, that that is not the situation presented by these documents and will indicate the reason why I do not think they are admissible under that theory. I had this same question presented during the trial of a case, United States vs. Standard Oil Company of California, which was an anti-trust case, in which the government had witnesses on the stand, most of them competitive suppliers of Standard, who had endeavored to sell their product to the dealers and [1343] had been informed by the dealer to whom they were endeavoring to make a sale that while they would like to buy the product, they did not dare to do so because of various arrangements that they had with Standard, exclusive dealing arrangements, potential forfeiture of their lease, and so forth.

The objection was made when a question was asked of the witness by myself——

The Court: These were witnesses you were offering?

Mr. Dixon: These were witnesses which the government was offering and who were on the stand and available for cross-examination.

I asked the witness, who was a competitive supplier of Standard, whether he had endeavored to sell his product.

He said he had, and then became specific as to specific dealers and contracts made and the results thereof of the efforts to sell, and during the course of that examination the witnesses testified that they had endeavored to sell to the dealer, but the dealer told them just what I indicated, that he couldn't buy or didn't want to buy for the reasons [1344] given.

Judge Yankwich had ruled that question improper, as being hearsay, when first asked. However, upon reconsidering the matter on the following day he reviewed his ruling and allowed the question and the answer on the basis of the cases which have been cited in this memorandum.

Now, there are some other cases on the subject that might be referred to that counsel have not cited. I refer to American Co-operative Serum Association vs. Anchor Serum Company, 153 F. 2d 907, as being a reported decision, and also refer to an unreported decision of United States vs. Kohler, decided by the District Court in Pennsylvania in March of 1953.

The Serum case dealt with a comparable question that we had in the Standard case, and the court

said that the reasons given a seller of a product by a prospective purchaser as to the reasons why the prospective purchaser could not buy the seller's product is admissible and is not hearsay or self-serving.

Now, in the Kohler case certain reports and letters written by salesmen of competitors to a defendant reporting conversations had with potential customers, to the effect that they would like to buy the salesman's product but had to buy the fittings from the defendant in order to get any products, was admissible to show the state of mind of the customer making the statement reported. The court went on [1345] to say, however:

"It must, however be supported by other evidence that the defendant did, in fact, refuse to supply the potential customer except under tie-in requirements, and the testimony of five of approximately six hundred of defendant's distributors was not sufficient to indicate the existence of a tie-in policy."

The Court: Was that last statement as a matter of law or as a matter of fact?

Mr. Dixon: I think it was a matter of law, your Honor. I will have to get that decision to refresh my recollection of it. But my recollection at the moment is that standing alone in the issues of the case, that it was not enough, and that is why I am coming down to the issues in this case, because in both the Serum case, in the Standard Oil case, and in the Kohler case, this evidence was admissible to show a state of mind of a particular person, which statement related to a restraint, which was the is-

sue involved in the lawsuit. In other words, it dealt with the violation charged and not with something that was wholly collateral to any issue that might be raised in the lawsuit.

That is the first distinction.

The second distinction is that the witness reporting the hearsay statement was in the courtroom and available for cross-examination. In other words, the competitive supplier [1346] was there for cross-examination by the defendant, and they were cross-examined.

It is to state the obvious to indicate to the court that there is no cross-examination of anybody available by these documents that the defendant is endeavoring to offer as evidence in this case, and as I think your Honor has already suggested, were we to admit these letters and documents, 60-some odd letters, all of which purport to apparently deal with complaints, certainly the plaintiff would not be bound by any statement contained therein and would be entitled to go fully into and explain, and to offer further correspondence, if any, in the case that related to these letters that the defendant is offering in evidence.

As I have indicated before, some of these letters that are offered refer to other letters and are in reply to letters received by or sent to the plaintiff.

Now, the whole picture must be in the case. I don't think that you can determine the state of mind, if that is what these are purportedly offered for, of a broker, by merely showing a single letter,

which may be capable of many, many different interpretations and explanations. [1347]

Now, that is obviously an entirely different situation from what is set forth in the cases that I have just mentioned, because these declarations, or whatever you want to call them, in these letters certainly do not, in my judgment, in any way relate to the fundamental issue in this lawsuit, which is whether or not these defendants combined and conspired and violated the antitrust laws as charged in the complaint.

They suggest that they do relate to the question of damages. I submit that I fail to see how in any sense they can relate to the issue of damages, because, let us assume that we have these 60 letters, and we assume they picked all they could find in their pickings of the file of this plaintiff for this purpose, the plaintiff corporation here has sold, and this is not in dispute, over a million and a half dollars worth of its products during the years 1949 and 1950. Some of these letters, as I recall them, go back even beyond that date. That certainly is evidence of some public acceptance of product, and I would say the fact that the sales were made is evidence of the creation of a market for the plaintiff's products.

Now, as your Honor has already suggested, as evidence of damage, going to the damage question here, it is wholly unsupported on the basis of my analysis of the sales made or the products involved. Some of them apparently, and [1348] I just chanced

to scan them Friday, dealt with, I think, navel juice, which the plaintiff has already testified that they had some complaints about. Certainly they wouldn't be admissible on that for any reason.

Some of them apparently are offered for the purpose of showing broker dissatisfaction with the product. Well, if the broker were here and the plaintiff had an opportunity to cross-examine, I think we could soon determine the extent of that dissatisfaction, but the plaintiff is certainly not to be bound by a broker's statement as to why he didn't or wasn't selling the plaintiff's product, because he may have had any number of reasons for not doing so, most of which would obviously not be disclosed in the written communication.

So it deals wholly with a collateral issue, these documents that they had offered, and would certainly raise a collateral issue. I would, therefore, say they are inadmissible on that ground to show the state of mind of anybody with reference to any of the issues in this lawsuit.

Coming now to the question of impeachment witnesses, I don't have the record before me, but I understand on pages 1047 to 1053, Mr. Winckler testified at length concerning complaints. There was rather an extended examination made by counsel of Mr. Winckler in which he endeavored to fully cover this subject. It is my recollection that the testimony [1349] given here in this brief does not in any sense of the term cover the whole testimony of Mr. Winckler on this subject. Mr. Winckler did

admit, as I recall the testimony, that he had complaints, some from customers, some from brokers.

I say it would be most unusual in a business of a million and a half dollars a year if there weren't some complaints, particularly when you are selling food products. Mr. Winckler didn't testify he didn't have any complaints.

He says broker or consumer dissatisfaction, to take their term. Well, what is that? That is a conclusion, obviously.

Further testimony of Mr. Winckler shows, I believe, that he had from time to time some complaints. Now, the plaintiff here has plenty of letters, your Honor, from consumers praising the product of the plaintiff here and inquiring as to where they could get more. It seems to me—well, I just wouldn't want to even endeavor to offer such documents in evidence in this case by way of rebuttal or any other reason, but I think they are good evidence if this is competent, in reply.

But there again we are dealing with a collateral issue, that is not the issue in this lawsuit, as to whether this product was good. The record shows it was sold, and whether it was good, whether some people liked it, whether others disliked it, is wholly immaterial, as I see it, to [1350] the issues in this lawsuit.

The issue in this lawsuit is as to whether or not the defendants combined together and violated the antitrust laws as charged in the complaint. That is the primary question.

If the jury decides in the affirmative on that ques-

tion, they then proceed to the causation question and damages. The damage here is not that which relates to whether or not the customers, a few of them, and I think Winckler testified it was maybe less than one-half of one per cent, or something like that, of the total sales made, I don't recall the testimony, but I don't think it makes any difference, but the issue here is as to whether or not the plaintiff corporation lost, No. 1, profits which it might have earned in 1951 by reason of any of the acts complained of here, alleged to have been committed by the defendants and, second, whether or not this plaintiff furthermore was forced out of business by reason of that loss of profits, which made it impossible for it to make and meet its commitments, financial obligations, in 1951, which resulted in the institution of proceedings under Section 10 of the Bankruptcy Act in March of 1952. That is obviously a causation question for the jury to decide.

Now, the jury may never get to the second question. They may decide that the damages here are limited to the loss [1351] of profits, if they decide the defendants have violated the antitrust law, but these documents, this sheaf of documents, 60 documents, approximately, that the defendants are asking this court to put into this record, I submit are not admissible, absent some testimony here of the brokers, of the persons making them, the availability for cross-examination by this plaintiff, and even then I think that is a collateral issue and such testimony would be irrelevant to any of the issues of this lawsuit.

So on the basis of the cases and the principles of law, which I do not deny to be applicable in the proper type of case, I submit that the cases and authorities cited are not applicable to the facts and the issues in this case, and they are certainly not applicable for the purpose of impeaching this witness on the basis of his testimony that is already in the record.

The Court: Before I hear from the defendants, let me see the transcript, 1047 to 1053.

(Mr. Strachan handing transcript to the court.) [1352]

The Court: All right. Who wants to be heard on this?

Mr. Fisher.

Mr. Fisher: Your Honor, we believe very strongly that this evidence is admissible. It is an exception to the hearsay rule. The California cases, and there are a number of them, bear it out. It is followed in the Federal Courts. The cases that we have cited——

The Court: Let's not argue about the rule. There is no doubt about the general rule of law. The particular question is the application to this case.

The almost startling example of the rule would be in a criminal case where a defendant was claiming self defense, and he therefore is permitted to testify that X told him that the deceased had said, "The first time that I see that so and so I am going to kill him."

Now, whether the person ever made that state-

ment, or not, is not important; the important fact there in the factual background is that this information was passed on to the defendant. True or false he is claiming now that he relied on it.

So we are all familiar with the rule of law, where items are admissible for the purpose of showing a certain thing was done, without respect to the truth of the matters contained therein.

Mr. Fisher: That is right. [1353]

The Court: The question is its applicability to this case.

Mr. Fisher: All right. The witness, Winckler, testified that he sold his products through brokers. My recollection is that there is testimony to the effect that he had 110 brokers. The plaintiff claims that the alleged actions of the defendant caused him damage, caused him damage in loss of profits, good will. There has been a good deal of testimony with reference to the trade-mark Anagold. This has a definite bearing in showing the state of mind of the brokers with reference to his product and the marketing of his product, and the brokers are an essential link in the distribution of plaintiff's product, and, therefore, it has an important bearing and is not a collateral issue, with respect to the alleged good will and the value of the trade-mark Anagold.

The Court: Now, let me ask a silly question. I hope it won't interrupt your chain of thought so that you can get back on your argument.

This is not a case where the plaintiff says that, "We made Valencia juice in '51, but we couldn't

sell it because the brokers wouldn't buy it." It is not a case where they say, "We had trouble selling it, and therefore we got stuck with a lot of juice."

This is a case where the plaintiff says, "We never made any Valencia juice in 1951, because of the acts of the defendants. [1354] Therefore we sustained a loss because we couldn't make juice."

It is pretty hard for me to see the pertinency, therefore, of what brokers might think about it. If they didn't have any juice to sell to the brokers, it wouldn't make any difference whether every broker in the country was down on it. If they never had any juice to sell, they never got that far along.

Mr. Fisher: But it does go to the value of the good will allegedly damaged by the alleged acts of the defendant.

The Court: You may have a point there. In other words, if there was damage, what was the good will and how was the good will damaged, therefore you claim that this is pertinent to proving good will?

Mr. Fisher: Exactly.

The Court: Go ahead.

Mr. Fisher: It bears directly on whether the plaintiff had the good will that they claim they had, whether they had the public acceptance, whether they could have sold their product had they made it, in 1951.

To my mind it is not a collateral issue. It bears directly on the question of damages.

The Court: Of course by your memorandum you concede something that you didn't concede the other

day when we were discussing this matter. I had this principle of law in [1355] mind, but nobody ever raised it. I asked what your showing was and the purpose. I asked various questions. You were offering the letters in toto. Now you disclaim by your memorandum that the contents of the letter, the factual matter therein, has any bearing. You offer the letter to show that complaints were made.

Mr. Fisher: Show that complaints were made and to show the intent, the state of mind of the brokers writing these letters. Not as to the truth or falsity of the statements made therein. [1356]

The Court: That's right. You want to show a complaint was made.

Mr. Fisher: That's right.

The Court: Which might be satisfied if the court permitted, for instance, the fact to be shown that a letter was written, without disclosing the nature of the contents of the letter.

Mr. Fisher: I don't see, your Honor, how the mere fact that the letter was written would show the state of mind of the broker. It seems to me that to get to the state of mind of the broker you have to have the letter in evidence.

The Court: You are thinking about the same thing I am, if these letters ever went to the jury, there would have to be extensive instructions as to how they could consider them and for what purpose.

Mr. Fisher: I think that is correct, that they should be limited with respect to the purpose.

The Court: Have you considered the fact that these letters are probably also double hearsay? In

other words, the broker is apparently relating the complaints he had from a grocer, probably triple hearsay, who, in turn, then passed on complaints he may have had from the customers.

Mr. Fisher: I don't see that it is far different from the California case that I cited, Phillips vs. Glazer. That was a slander of title case, and the Appellate Court approved [1357] the admission in evidence of statements made by prospective purchasers out of the presence of the defendant. The court said:

"It is contended that the statements ascribed by the witnesses to prospective purchasers were hearsay and incompetent. In the same breath appellant admits it is an exception to the hearsay rule when the intentions, feelings or mental state of a certain person at a particular time is material to the issues. These authorities establish the rule that such declarations when used not to prove the truth of the matter asserted but to establish the state of mind of the declarant are not within the hearsay rule."

The Court: I haven't read this case, but I am a little confused about it. Page 4, line 32, you say, "Statements made by prospective purchasers," and on page 5, quoting from the case, you talk about statements to prospective purchasers.

Now, what was the factual situation? Statements to a prospective purchaser or by a prospective purchaser?

Mr. Fisher: It was by prospective purchasers.

The Court: Then quoting from the case on page 5, line 3, you say to prospective purchasers. What was the factual situation?

Mr. Fisher: The factual situation there was that there [1358] was a man that owned a lot down in Malibu and he claimed that the building on the adjoining lot was built over his line. He posted up a big sign to the effect that there was this encroachment, and anyone buying this property would be subject to damages if they were to lease it, and so forth. It was a slander of title suit.

The Court: Against him?

Mr. Fisher: Yes.

The Court: By the owner of the adjacent lot?

Mr. Fisher: By the owner of the adjacent lot. They permitted their brokers to—a person who had the leasing, apparently, of the property, to testify to the reaction of the purchasers, prospective purchasers, I should say, the statements of the prospective purchasers.

The Court: The plaintiff, in other words, who claimed his property was slandered was permitted to put his broker on who related statements by prospective purchasers?

Mr. Fisher: That is my recollection of the case.

The Court: The broker, therefore, would testify that prospective buyers would come in and say, "Well, I can't buy the property. Apparently it encroaches on this man next door. Therefore, I won't buy it." Right?

Mr. Fisher: It was the state of mind of the prospective purchasers. The court admitted it by showing the reaction of these prospective [1359] purchasers.

The Court: As testified to by the brokers?

Mr. Fisher: As testified to by the brokers.

And in the du Pont case, United States vs. du Pont, there was a letter which was admitted in evidence showing the state of mind of Durant, the writer of the letter. Durant had been deceased a number of years. It was admitted for the purpose of showing the state of mind.

Now, here, these letters of brokers are sought to be introduced to show the state of mind of the brokers.

The Court: Do you intend to lay any further foundation as to how many customers, how many brokers in total were involved? How many were involved in these letters?

Mr. Fisher: Well, they are, if you please, substantial.

Mr. Strachan: May I speak to the court on that subject?

The Court: Yes.

Mr. Strachan: I was going to suggest, if your Honor indicated you intended an adverse ruling on the offered evidence, to suggest that instead of completing the record at this time, I be allowed to review these letters. It is not a complete collection. The way I have approached this case so far has been to deal topically with various occurrences which we feel affected the lack of success of Mr. Winckler's business. I know there are some letters of others I haven't reached yet that are not included in this group.

On the other hand, in the 67 letters which [1360] are here, there are some which are not complaint

letters. I think they are admissible on the basis of admissions, perhaps, Mr. Winckler's own letters.

So I would suggest, procedurally, that I defer the offer at this time until I could get a little better organized. I doubt whether there would be any substantial change in the foundation we offered.

The Court: You don't propose to offer how many brokers he dealt with as related to how many letters you have?

Mr. Strachan: Not as foundation for these exhibits.

The Court: Well, of course, this is a hypothetical case, but supposing it would be shown that the man had 10,000 brokers and you offered a letter from one broker as to his state of mind. Do you think the court should admit that?

Mr. Strachan: If it bore on the issue, yes.

The Court: When the question is the state of mind of the brokers collectively? The acceptance of the product?

Mr. Strachan: I think you can show the experience that each broker had in his own territory, and why it was in that territory the products were not publicly accepted by the market.

The Court: Well, I don't know for sure what I am going to do with it, but if I were the plaintiff in this case, I am no trial expert, but if I were the plaintiff and you would put in evidence like that, I think I would have a field day. [1361] Talk about the house that Jack built, which one of my brothers referred to in the Karseal case.

It was the plaintiff's complaint they didn't get

to make any juice, so you are going to defend on the basis in part that even if they got to make the juice, they couldn't have sold it. That doesn't take us very far along to a solution of this issue.

Mr. Strachan: Well, we don't agree with plaintiff's theory that he didn't make juice because he couldn't get fruit. I rather think when the evidence is completed it will be very clear he couldn't get fruit because he couldn't pay for it.

The Court: Do I understand you to say now you are not prepared to make your offer of proof at this time? [1362]

Mr. Strachan: If I did, your Honor, I would want to reconsider and make a reoffer later if I found it wasn't sufficient, so I would rather have your Honor give me an opportunity to review the whole subject and get all of the files together, in the event the ruling is adverse.

I might say this: I do think that an exclusion at this particular time would be particularly hurtful to the defense, because Mr. Winckler has testified that there were no complaints. We started in to show some complaints. We got three or four letters in, and then we were stopped. I think we stopped at about the point where Mr. Winckler had said that Mr. Schmelzer who wrote that one complaint letter had paid him a high compliment six months later.

There are three other letters after that so-called compliment to show that Schmelzer was extremely dissatisfied with the merchandise that he was trying to move.

The Court: Of course your memorandum starts in with the proposition that this is admissible on the issue of causation, and then the last paragraph of the memorandum states that they are a direct contradiction of his testimony, which is impeachment. So you are really approaching it on two grounds.

Mr. Strachan: That is right.

Now, on that causation ground, if I may, your Honor. You may recall in Mr. Hurd's opening statement he talked about the cyclic nature of Winckler's enterprise. He [1363] would start in business, he would do some business, and then he would lose and lose and go into bankruptcy; he would come out of bankruptcy and make a fresh start, and about every four years he goes in bankruptcy. Now, one of the elements of proof, that the failure of the business the second time was not due to inability to get juice, will be a showing that steadily from 1949 through '51 his business was on the skids, it was going downhill, and by the middle of the summer of 1951 he had nothing to buy fruit with. He was absolutely broke. And the reason that he was in that condition was because he had had lack of success with the blends, he had had lack of success with his navels, he had hurt the brand name with the navels; he had had lack of success with his ades, he took big losses on those; he hurt the market for, even, single-strength juice. So by the time he gets down to the first of July, the 31st of July—I have forgotten which it is—he is absolutely broke and he can't stay in business anyhow.

That, we say, is a consequence and a causative result of these business practices which spoiled the market for the Anagold product, and also destroyed his broker organization.

The Court: As to impeachment, I haven't any doubt that producing letters as to navel juice is not impeachment, because of the admissions made by Winckler, so you will [1364] have to sort your letters out on that basis if you are offering them for impeachment. Those that involve navel juice are clearly not impeachment.

As to impeachment of Winckler on other products besides navel, you probably should be permitted to show the fact of a complaint as to some other product brought to his attention, in view of his very broad statement about complaints.

However, it will be limited, and the jury would have to be instructed exactly what issue it was pertinent to.

I am talking now about impeachment. I don't have much problem about the impeachment problem. I think you would be entitled to show impeachment about products other than navels, or navel blend, and not entitled to show any impeachment on any matters involving navel.

Most of those letters did concern navels.

If you had one of those ambiguous letters that doesn't tell what the brand is, if you could develop from the witness that it concerns something other than navels, then, again, I think you would be permitted to show the fact of the complaint.

As to those ambiguous letters that talk about

being stuck, I think that those are not proper. I don't think they are impeachment. They open up an entirely new issue, new collateral issue. What does he mean by "stuck"? What was he stuck with, and why was he stuck, and when, and a lot [1365] of issues which would merely multiply endlessly the issues in the case?

So my thinking is fairly clear on impeachment. If you want to sort your letters out on that basis, I will see what you have got.

Mr. Strachan: Might I raise this next question, your Honor?

Here is a letter from Winckler to the Mississippi Sales Company. He says:

As soon as we have prices we will wire you. However, we are wondering why you suggest that we give you orange juice under some label other than Anagold. Your explanation would be greatly appreciated, and we will be glad to comply with your request, but we would like to have this explanation.

And his broker writes back:

We have your letter of the 16th, and in answer to our letters of the 4th addressed to the attention of Mr. Winckler, and we know that you want an explanation as to why we want a label other than Anagold. Our reason for asking this question is due to the fact that a good many jobbers here were caught with large stocks of your orange juice under the Anagold label, and it stayed on the [1366] wholesalers' and the retailers' floors and they had to reduce the price considerably to move it, and we

think if we could secure another label we would have less sales resistance.

Now, I don't know whether the juice that was shipped there was or was not Valencia. I think that is largely beside the point, because the fact is that Anagold had developed a bad name in that territory, and I think we should be allowed to show that, quite without regard to whether it is a Valencia or navel product.

Mr. Dixon: If the court please, I would just like to comment on this last statement of counsel. It seems to me that is the most complete non sequitur that I ever heard. Merely because some brokers had some Anagold juice in stock, and they may not have been able to sell it because they didn't want to let it go at a price which would mean a loss to them, or the Florida market might have flooded it, and therefore this juice didn't move, is no reason at all to offer that, or to permit any inference to be drawn—and it is purely an inference and conjecture at the best—that this so-called "caught" situation resulted from an impure or bad product. And that is the inference that counsel wants this jury to draw from that letter.

That is my objection to this whole type of use of this type of a document in evidence. [1367]

I know of no case, your Honor, where the court has gone to the extent that counsel wants this court to go in this case.

In the situation referred to in the California case it appears to me, although I haven't had a chance to get the facts, that they were talking about

—a witness was on the stand and he was permitted to say what prospective purchasers had told him as to why they wouldn't want to buy the land. That is the statement of a declarant. In other words, the decision refers to the declarant's statements.

A declarant means somebody who has made an oral statement to me. It does not deal with documentary evidence.

I don't know the circumstances under which the Durant statement of 1920 was admitted in the case against duPont.

That would be more analogous to what they are offering here, because here they are dealing solely with letters or documentary evidence, not oral statements alleged to have been made to a witness on the stand available for cross-examination who was permitted, and properly so in my judgment, to give that kind of testimony.

But counsel has just read this letter, from which he wants the jury, obviously—otherwise it has no purpose—to infer that Anagold had a bad name—that is his inference—in Mississippi, because some brokers got stuck with the brand down there. [1368]

They may have been stuck for a number of reasons. They couldn't move it because Florida moved in with a low price and they were stuck with a higher priced product, so they didn't want any more of that, because it stuck in their mind. They didn't want any Anagold, but they would take the same juice under a different name.

Are we to infer from that that the product was bad?

That is what counsel wants this to go in for, if I understand his offer.

The Court: No. He is arguing in that particular case that it is in to show the lack of value to the Anagold trade name. So that if the juice was good, but the label had a bad reputation, he would argue that, therefore, they didn't have a good trade-mark and, therefore, they couldn't have sold their products had they been able to make them.

Mr. Dixon: That is right, your Honor, but he has to infer that. There is nothing in that letter, unless I am misinformed—I don't have it before me—that indicates that the product itself was bad. Maybe there is. I don't have the letter. But that isn't the statement that the broker is alleged to have made in this letter, that the product was bad. He just didn't like the label. Why? Because of any number of reasons, where I am entitled—the reason that I gave is just as good as the reason that counsel wants this jury to infer, without any foundation in the letter at all. [1369]

The Court: But your argument there would be the argument as to what inferences you would draw from the letter.

You could draw yours, and they could draw theirs.

That letter may or may not fit this rule.

If it came within this rule that the letter was only admitted as a basis of some complaint, and not for the truth of what was said, then, of course, the issue would only be, was a complaint made—and not the truth of what was said.

Now, the very purpose of that rule, of course, is to assist in cutting off these endless inquiries into the facts of the matter that lay behind these things.

So, for instance, if it is permitted to show that X made a complaint, that is the end of it. Not what he complained about, but that he made a complaint. Then the only issue is, did he complain?

If you go into what he said, then you open the door up—unless you can instruct a jury to ignore this matter that you bootleg in under the offer, even with the restrictions given by the court—then you open up issues as to whether this was true or not true, and the question of trying to rebut the inferences that might arise from the alleged factual matter.

Now, the letter that you refer to, Mr. Strachan, are you offering it solely to show that such letter was written, or are you offering it to show some of the facts contained [1370] therein?

Mr. Strachan: I am offering it to show what facts were contained in the representation made by the broker to Winckler. Not to show that he correctly represented the facts, but to show what facts were represented.

The Court: You are raising the general issue of broker acceptance of the product and the trademark, is that right?

Mr. Strachan: That is one of the issues to which this is directed.

The Court: Well, that is the issue, outside of impeachment, I take it. What other issue is there outside of broker acceptance of the product and

the trade-mark? You are not offering it, so you say, to prove that the products were defective. [1371]

Mr. Strachan: That particular letter has no reference to quality of product.

The Court: I am talking about these general letters. You are not offering the letters to show the products were defective. You disclaim that. Mr. Fisher concedes for you there should be instructions to the jury if they do go in.

Mr. Strachan: That they are not proof of the facts that they contain.

The Court: So you are offering them to show the brokers' state of mind, as it were, as to the product?

Mr. Strachan: That's right.

The Court: Does that sum it up?

Mr. Strachan: That's right, plus Mr. Winckler's knowledge of the facts presented in the communications.

The Court: Now, wait a minute. You mean plus Mr. Winckler's knowledge of the state of mind? You said the facts contained in the letters.

Mr. Strachan: Yes, knowledge of the brokers' statement of their state of mind, that's it.

The Court: Then you are offering these generally for the brokers' state of mind as to the product and the trade-mark, and Winkler's knowledge of the brokers' state of mind?

Mr. Strachan: Yes, sir.

The Court: Disclaiming any interest in the facts themselves [1372] that lay behind the letters?

Mr. Strachan: Well, I don't say we are disclaim-

ing any interest in the facts. We are disclaiming any claim that the letters are admissible as proof of the truth of the statements that they contain.

The Court: Have you made any search as to how broker intention in the merchandising field and customer intention is proved?

Mr. Strachan: No, sir.

The Court: It seems to me that there must be some law on it. You run into it rather commonly in the unfair competition field. You don't run into it, I suppose, in the antitrust field. You run into it in the unfair competition field, particularly in the matter of palming off. I haven't made any search on it, but I know that it is enough of a problem that some courts have sanctioned the sampling of opinion, the thing that is done in the commercial field and not ordinarily done in the law, but it has been permitted in some cases, the use of an accurate scientific sampling of opinion, as it were, in the trial of a legal case.

Mr. Dixon: If the court please, it seems to me there is another problem. Let's assume some of these letters go in. Where are we to stop? In other words, am I to be precluded then from inquiring of Winckler concerning this transaction? Am I to be bound, or are we to be bound by whatever [1373] inference counsel wants the jury to draw from the letters? It seems to me we just start an endless circle here concerning these transactions.

I submit that the exception to the hearsay rule doesn't apply to this situation at all. It has a legitimate and proper basis of use where you have a

witness on the stand relating that kind of testimony.

The Court: Well, you might look further. I didn't feel like doing a lot of work. The only thing I had at home was the Model Code of Evidence. I noticed in certain of these questions of admissibility of evidence that under the Model Code the court was given very wide discretion. I don't know whether that comes within the discretionary field or not. I don't know.

What Mr. Dixon suggests is what bothers me. There has to be a cut-off point in order to keep the lawsuit from becoming a series of small trials on issues on the fringe, rather than the trial of the major issues of the case.

Mr. Fisher: May the court please, may I suggest the court consider United States against du Pont, where the court said, and this is where there was a matter of admitting in evidence a letter which had been written by Mr. Durant, and he died afterwards, before the trial:

"Wherever an utterance is offered to evidence the state of mind which ensued in another person in [1374] consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it. The condition of the speaker's mind, as to knowledge, belief, or the like, may be evidenced by his utterances as assertions or considered circumstantially as affording indirect inferences. Therefore on this principle the hearsay rule interposes no obstacle to the use of letters, or any form of verbal utterances by one person as circumstantial evidence showing a state of mind. Such a declara-

tion, however, is to be received only as circumstantial evidence to show the fact of the utterance indicating the state of mind or intent, but are not to be used to prove the truth or correctness of such statement."

The Court: Well, Mr. Fisher, I have no doubt that is the law. Where you have one man involved, your problem is simple. The criminal example is the same thing. The problem is a simple one where you have one individual involved.

Here we don't have one man here. You have a question of what was broker acceptance of the Winckler product and trade-mark by various brokers that handled the product. You bring in certain letters and from the statements, from letters that you claim come within this rule, then collectively you are going to argue that represents the general state [1375] of mind of the brokers.

I submit the problem isn't that easy. I am not sure I know the answer to it, but it is a different problem than the one-man proposition where you have an issue involving one man. You have an utterance made. It is admitted, not for the truth of what was in the utterance, but for the fact that he made an utterance. It is a common happening in the court, and we instruct the jury they may consider it for one purpose, but not for another purpose. That isn't what we have got here.

Maybe you can argue that is what you have got collectively. You have got a series, and so forth, but even then you are more interested—really, you are interested in showing generally what was the public

acceptance of this product. If the public acceptance was good, even if some broker didn't like it, he couldn't have sold it. If the public acceptance was bad, he couldn't have sold it even if the brokers did like it.

So you get mixed up with broker and consumer acceptance of a product. The offers that you make disturb me. I haven't ruled on that end of it.

I think I have indicated what I will rule on the impeachment end. The impeachment end pretty well falls into place.

But this one I will have to give some more study.

All right. Any other suggestions before we [1376] adjourn? I am going to adjourn now until tomorrow morning.

Mr. Dixon: I was going to just make this added comment, your Honor. With reference to the du Pont situation, I would be the first to concede that that carried a statement by Durant, knowing what I know about the du Pont-General Motors case, that would be admissible without any question, because there the question was whether there had been conspiracy, and the statement, while I haven't read it, of Durant was he was forced to sell his stock by the pressure put on him, to show his state of mind. That would be clearly admissible, but that is not this situation, in my judgment, and that is not what counsel is offering it for, because we have to show the number of brokers, and we have to go into numerous collateral situations if we are to even begin to reply to them on that basis.

The Court: It would also seem to me before this

evidence would be admissible in any event, if it is admissible on that other theory, there would have to be a more extensive foundation. There would have to be a foundation as to the number of cases sold, the number of brokers that sold them, and we would have to make some determination as to the materiality of this, even if it is admissible on the other score, because it is the type of thing that is damaging. You can instruct the jury on what the law says, and the law says that we can infer the jury follow the instructions. [1377]

Mr. Strachan: Of course, that is all information that is readily available to the plaintiff in the case from their own records.

Mr. Dixon: That is not part of our case.

The Court: That wouldn't answer the question. I said it seemed to me, I am not ruling on that, that a foundation is required. Just because the plaintiff may know what the foundation is, that doesn't supply it for the court record.

Also, if these letters, of course, are considered as impeachment, we have no obligation under our rules to call attention to them, because our pretrial requirement that you exhibit documentary evidence or advise what documentary evidence you are going to use, does not apply to impeachment, but we are beyond the impeachment point now. You are using them for another purpose, and apparently they were not exhibited nor was attention called to them so that the matter came on with the documents not having been called to the attention of the plaintiff.

Mr. Strachan: I didn't participate in the pre-

trial aspects of the case, your Honor. It is my understanding there has been a substantial compliance with the requirement of that rule in this, that when defendants were given access to the plaintiff's books and records, the agreement was that those which they selected, and presumably they were being selected for evidentiary purposes, would be identified and that copies [1378] would be made for the plaintiff's use, so that the plaintiff has been on notice ever since the documents were made available that they were selected for evidentiary purposes.

The Court: From what I understand, you selected thousands of documents, and that wouldn't be a compliance, as I understand it, with our requirement. Mr. Stark was asked whether or not —something was said about Mr. Stark saying he had returned some of this information to the plaintiff. Mr. Stark was asked whether he had called their attention to the fact that these were going to be offered in evidence, going to be used, and he said it was not, if I remember rightly.

Mr. Williams: May I clarify what happened here?

The Court: Yes.

Mr. Williams: I selected these documents from the files of the plaintiff, which were not made available to us until about the middle of November. These are the brokers' files. There were quite a few arguments about whether we would or would not get discovery of them. So we obtained these copies for the first time in November. We obtained them with an agreement with the plaintiff that, in the first

place, they would be allowed to look at all the documents we marked from plaintiff's files before we made copies of them, and they then gave us permission to make copies of them with the understanding we would give a complete set of the documents of [1379] which we made copies to the plaintiff. That was done. That is how the plaintiff happens to have copies of all of these documents.

The Court: You mean a photostatic set was given to the plaintiff?

Mr. Williams: Yes, made at our expense under the arrangement we had with them. Mr. Stark delivered that set to Mr. Dixon. I prepared the set.

As I understood your pretrial order, my recollection, which may be incorrect, was that it applied to documents that we expected to use from primarily our files, because we assumed that the plaintiff knew what it had in its files. So I have never construed that to mean documents from the plaintiff's own file.

Mr. Dixon: Well, I just want to clear the record on this point, your Honor, since there has been some discussion on it. These files were made available to counsel en masse, so to speak, with the request that if they made copies of anything that they make also a copy for us so we would know what they had made copies of, that's all, which counsel did.

They did not tell us they ever expected to use these documents, and I had assumed they wanted access to the files for the purpose of getting leads, and that is as far as the matter has gone. Counsel

has never indicated to me, as Mr. Stark said, that he expected to use all these documents. [1380] If he had, it would be an entirely different story. I would have had an opportunity to look them over, to have segregated them, and I could have made a more intelligent discussion and argument on them at the time they were offered last Friday, had they done so. [1381]

* * *

The Court: The record will show the jury absent.

I am prepared to make a further ruling on this evidentiary matter. Rulings are, I suppose, always tentative. I might change my mind. But I think I have got the answer.

Let me say preliminarily I never have failed to have wonder and amazement when I read Wigmore. I don't think there is any text ever written where the text writer sets out more logically and accurately and reasonably rules of law than does Wigmore. It is hard to read and you have to find the particular section, because it is so detailed, but I pay that compliment to a great text writer.

We have presented here the question of certain letters, documentary evidence which has been offered by the defendants or which will be offered by the defendants generally to prove the state of mind of brokers who handled the Winckler & Smith products, state of mind as to the goods and the trademark of Winckler & Smith, and Winckler's knowledge of their state of mind.

That then presents the two-fold problem, one, that the letters are offered allegedly, not for the

truth of the statements contained therein, but for their evidentiary value, [1385] circumstantial evidence of the assertions made, regardless of the truth, and, secondly, the question of impeachment which would be involved on Winckler's knowledge of statements made, in view of his previous testimony.

I have already indicated my ruling on the impeachment question. I read the transcript over and I am satisfied with it. Certain of the letters may be proper on the question of impeachment.

Now, as to the other problem as to the admissibility of these letters for purposes other than impeachment, first, I made a check of McBaine's Evidence Manual, largely California law, and the pertinent section there is Section 221. I will read the heading:

"If, however, evidence of words spoken is not admitted to prove the truth of the matters asserted, but merely to prove that the words were uttered, then it is not hearsay."

The cases cited indicate that that clearly concerned the situation of the state of mind of the person to whom the utterances were made.

That then got me thinking about the problem, and we went into Wigmore for a more detailed breakdown, and beginning at Section 1776, Third Edition, is a subtitle: "Hearsay rule not applicable, verbal acts, res gestae, etc."

Then follows the section quoted in defendants' brief: [1386]

"True history of hearsay rule is nowhere illus-

trated and emphasized than in those cases which fall without the scope of its prohibition. The essence of hearsay rule is the distinction between the testimonial or assertive use of human utterances and their non-testimonial use.

"The theory of the hearsay rule is that, when a human utterance is offered as evidence of the truth of the facts asserted in it, the credit of the assertor becomes the basis of our inference, and, therefore, the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the hearsay rule."

Most of that is quoted by the defendants. [1387] Proceeding in the same section we then find, page 180:

"What here remains, then, is to distinguish and mark off the various classes of utterances which legally pass the gauntlet of the Hearsay rule because it does not apply to them. The classes of utterances thus exempt may be grouped under three heads:

"1. Utterances material to the case as a part of the issue;

"2. Utterances accompanying an ambiguous or

equivocal act, itself material, and serving to complete the act and give it definite legal significance; that is verbal parts of an act;

"3. Utterances used circumstantially, as giving rise to indirect inferences, but not as assertions to prove the matter asserted.

"But before examining these several branches of the principle, it is necessary to turn aside for a moment and inquire into the origin and scope of the term 'res gestae,' which finds here its main and least inappropriate application."

Then Wigmore proceeds to take up res gestae, which we are not concerned with. He then takes up the three subdivisions that he listed. One, the utterances material as a part of the issue. Section 1770 concerns particularly marriage, [1388] breach of promise, notice, insurance proofs, defamation. And from reading the section—and I will let you read it—our problem does not come within that part.

Then he takes up utterances forming a verbal part of an act in Sections 1772 to 1786, and again we do not come within that particular part of it.

Then he takes up 3, utterances used as circumstantial evidence, and that is the part you gentlemen are interested in. Sections 1778 to 1792.

Incidentally, the du Pont case that you cite is cited in the supplement under one of those sections.

Going, then, to this third subdivision beginning on page 234.

Section 1788:

"The hearsay rule forbids merely the use of an

extra-judicial utterance as an assertion to evidence the fact asserted. Such a use would be testimonial, that is, we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the hearsay rule forbids is the use of testimonial evidence—that is, assertions—uttered not under cross-examination. If, then, an utterance can be used as circumstantial evidence, that [1389] is, without inferring from it as an assertion to the fact asserted, the hearsay rule does not oppose any barrier, because it is not applicable."

Then comes 1789, and this is the most common example of this exception. It does not apply here.

Section 1789:

"Knowledge, belief, good faith, reasonableness, diligence, motive, sanity, as evidenced by receipt of information or by reputation."

The text reads:

"Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned."

Now, stopping right there. If we are interested in these letters as evidencing the state of mind which ensued in Winckler in consequence of the utterance, then we have nothing but the impeachment problem. In other words, we do have an impeachment problem if Winckler knew of these let-

ters of complaint and had denied that he received complaints, except as to navel juice. But this Section is limited to the state of mind which ensues in another person in consequence [1390] of the utterance.

So we will skip 1789.

Then we come to 1790. This is the least used of these two exceptions. It is the hardest to see and understand.

"Utterances as indicating circumstantially the speaker's own state of mind."

The text reads:

"The condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, either used testimonially as assertions to be believed, or used circumstantially as affording indirect inferences. Utterances of the former sort may be received under the Exception for Statements of a Mental Condition."

We are not concerned with that.

"Yet such direct assertions of a mental condition as, 'I know that Doe is insolvent,' or 'I dislike Roe,' are relatively less common as a source of proof. The usual resort is to utterances which circumstantially indicate a specific state of mind causing them.

"To such a use, then, the hearsay rule makes no opposition, because the utterance is not used for the sake of inducing belief in any assertion [1391] it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference

alone regarded. This discrimination, though well accepted in the law, is easy to be ignored, and it needs perhaps to be emphasized."

Then he proceeds to summarize, page 239:

"These various circumstantial uses have already been examined in dealing with the different kinds of circumstantial evidence; and the precedents are collected under those respective heads. It remains here merely to note briefly the chief kinds:

"(1) Utterances are receivable as evidencing indirectly insanity or other organic mental condition, or as evidencing physical condition as to illness or the like.

"(2) Utterances indirectly evidencing knowledge, belief, consciousness, and the like, are equally admissible. Some difficulty may here arise when the fact of belief or consciousness is itself of doubtful relevancy."

Then it goes on and he comments on some matters concerning marriage, legitimacy.

"(3) Utterances indirectly indicating fear, ill will, excitement, or other emotion on the part [1392] of the speaker are also admissible, whether the person be one whose state of mind is in issue, or be a witness whose bias is to be ascertained."

There he talks about utterances with a mob or riotous assemblage.

"Section 1791. Utterances serving to identify time, place, or person.

"1792. Witness' statements used in impeachment."

Now, it is therefore clear to me from reading this

text that letters which would indicate a general state of mind, knowledge, or consciousness, belief or disbelief, would be admissible. But when you try to add to that a specific thing, namely, that the broker had a particular belief that he didn't want to handle Winckler & Smith products, you are entirely out of the rule. You have then run up against the requirement that if this matter has any more value than the mere fact that it was uttered, and to show some general state of mind, then you run against the hearsay rule and the witness must be produced for cross-examination as to the truthfulness of this particular belief or viewpoint or intention, whatever it is that you want to show.

From reading the text in detail, I am firmly convinced that the letters are not admissible for that purpose.

They are, further, not admissible for the further reason [1393] that the question in issue is not the state of mind of the broker in 1946 and '47 and '48, or '49 or '50; the question in issue directly is what was the broker's state of mind in 1951 had the plaintiff manufactured juice, and had the plaintiff asked the brokers to sell in '51 would the brokers have sold? [1394]

Now, to argue that something as remote as this, that happened several years ago, on some presumption that things once shown to exist would continue to exist, to my mind is too remote on the issue as to the broker's intention and what he would or would not do in 1951, which is the time in issue.

Nor are such letters admissible to show merely general state of mind and not a specific one, to have any bearing on the question of the value of good will, or anything of that sort. If you are offering them for that purpose, notwithstanding your disclaimer that you are not interested in the facts contained, you are therefore going beyond the exception permitted, and you are going into a particular thing within the letter which should be the subject of cross-examination.

Reading the text in detail, I may be in error, but I am not in doubt.

Mr. Strachan: I am not trying to argue after the ruling, but I do want to state it is our position that these letters do bear on the subject of causation. They do have a bearing on the question of whether there existed good will. They do have a bearing on why the Winckler-Smith business was unable to market its products, not only in 1951, but because its business had been deteriorating steadily for a period of three years, and by 1951 it had lost substantially all of its broker organization. I just state that. [1395]

I might add that I don't think in his categories Wigmore has taken into account the law as applied in the du Pont cases and the California Broker cases and those other cases where the document or the utterance was received, not only to show what influence it might have on the attitude of the recipient of a communication, but to show the attitude and state of mind of the speaker.

I also think and contend that the documents are

admissible as a part of the records of the plaintiff passing in the ordinary course of business on a subject which was of mutual interest to the parties to the communication.

Your Honor's indication as to what the scope of the ruling would be, I would like to have applied to particular documents, and I don't think it would be advantageous to anyone to have the matter handled before the jury. It would only confuse the jury and might raise some prejudices, so I would like to work out some sort of a stipulation and arrange to apply your ruling to each document. I think there will be some in the 65——

The Court: There may be some that would come under other rules.

Mr. Strachan: That's right.

The Court: I am addressing myself now to the general offer under this alleged exception to the hearsay rule. There may be other rules that apply, admissions against Winckler, and things of that sort.

I might call attention to the fact that in the du Pont case, although the judge has written a very good opinion there, the interesting thing is he started out with one rule and then switched over to another rule. He started with the rule that you quoted in part: "Wherever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it," and so forth, and then he

switches to the condition of the speaker's mind may be evidenced.

Actually, what was involved in the du Pont case was evidence of the speaker's mind and not the recipient. He started out with the more common rule and then switched to the other one. It is a little hard to read the case, although I think he clearly is in line on the state of the speaker's mind.

Of course, in the du Pont case the letter pertained also to a particular issue and was current as of the time of the issue and bore directly on that issue. It was not a matter such as we have here.

But I am not going to say whether I think the decision was right or wrong, except it certainly can be distinguished.

The Glaser case, of course, comes within the other portion of Wigmore on particular things at issue and does not come [1397] within the rule here.

But you work out some way to offer them, and if you can segregate them as to certain groups, it will help to do that.

Mr. Strachan: When would your Honor like to take this matter up? I would like to get it disposed of before we resume with the jury for the reason I had organized the remainder of the cross-examination in such a way that I would expect to intersperse these broker letters as I went through the cross-examination on various subjects.

The Court: Do you have them well enough in mind now to present them without having to take them up one at a time? Is that what you want to do? Present them one at a time?

I suppose we could give each an identification number and look at each one of them.

Mr. Strachan: It seems to me that is the only way to avoid error, your Honor.

The Court: Well, is there any objection to taking them up now?

Mr. Dixon: No, I have no objection, your Honor. I just wish to add this comment, that this whole subject, of course, has been opened up by the defendant on cross-examination into something which is certainly beyond the scope of the direct examination. I haven't objected to it because it doesn't make any difference, probably, when it comes in, but when I started out, I thought it was going to be limited to [1398] one or two things, but it now appears that this whole approach of the defendants is apparently being directed to the question that there wasn't any good will here. That seems to me a matter of defense rather than part of the cross-examination, and I suggest that at this time this might more properly come within the issues of the defendants' case, if that is what they are contending it is offered for.

As to the impeachment question, and that is what I understand one of the letters has already been admitted for, although my memory may not be correct on that, the testimony that is relied upon for that purpose seems to me to require further clarification. If it is the answer of the witness, "I have no knowledge of any broker or consumer dissatisfaction at all, except on products which contain navel juice, or was pure navel juice," then the dis-

satisfaction, the broad term might require explanation.

I assume from the position taken by the defendants here that they are trying to impeach this testimony or this statement of the witness on the ground that these documents are complaints as to quality of which he had knowledge.

The testimony of the witness, it seems to me, before any impeachment use could be made of any of these documents, the witness should have an opportunity to explain, and since this is cross-examination, and I have not had that opportunity to clear what he means by consumer dissatisfaction, [1399] as to what he understands a complaint to be, because I have gone over all of these letters that the defendants are seeking to offer into the case at this time, I am frank to say that much of the material contained therein appears to be purely routine correspondence between a broker and the supplier concerning the problems of marketing, and as to whether or not some of the inventory that was on the shelf, for instance, lemonade, in October, that hadn't been moved during the summer months, should be sold and disposed of at that time, or whether it should be carried over until the succeeding spring, and some of these letters deal with that product.

After you go through two or three of the letters and orgainze them, and it was a terrific job for me to do that, but they tie in and show that the problem was moving inventory in a product that should be sold. That I am sure Sunkist or anybody in the

fruit business does. My point is this, your Honor——

The Court: I indicated the ruling on impeachment yesterday, that I was going to admit letters that made complaints or product other than navel, but not letters that talk about, for instance, being stuck, which wouldn't mean anything.

Mr. Dixon: My only point, your Honor, is this. Impeachment, of course, is—I am not concerned about what the jury would consider with these letters, to be perfectly frank, for that purpose, but it seems to me if that is what [1400] they are going to offer some of these for, that they should come within the rule and go through the procedure, "Did you state so and so?" and then come up with a contrary statement.

The Court: When we find letters that will be admitted in the presence of the jury, we will then follow the regular procedure, but here outside of the presence of the jury we are going to apparently go through them, and those to which objection is sustained, of course, will have nothing further to do with the jury.

Also, some of the letters which may be in doubt, counsel would have a right to interrogate Mr. Winckler about.

Suppose there was a letter which complained about a certain product and he couldn't tell from the letter whether it was navel juice or Valencia? Then he would have a right to inquire of the witness, if he so desired, "What does this pertain to?"

If it pertained to navel, I am going to exclude it for impeachment purposes. If it pertained to Valencia, I will probably admit it, because of Mr. Winckler's broad statement that he had had no complaints except as to navels.

Now, of course, on examination by counsel for the plaintiff, he would be entitled to make whatever explanations he can. That is proper.

Mr. Dixon: The only point I was raising, your Honor, [1401] is the langauge here of consumer or broker dissatisfaction, as to what that meant within the scope of these letters and documents.

The Court: That is the subject of cross-examination.

Mr. Dixon: Yes.

The Court: You can ask him and the defendants can ask him.

Mr. Dixon: My point, your Honor, at this time is the defendant hasn't made it clear, at least to me, as to what this witness means by dissatisfaction. It may well be that it would be with the product and that he would regard anything of that kind as in the nature of a complaint, but if I understand the defendants' position on these documents, they are trying to use them for impeachment purposes on the theory that these are complaints, and that he has testified that there were no complaints, not with the language of a complaint, but the language of consumer dissatisfaction.

The Court: Any disadvantage that you find yourself in in that respect, nobody is doing it but

Mr. Winckler when he made the broad statement that he knew nothing about broker dissatisfaction.

Mr. Strachan: I want to add this, that I have some letters, I don't have them here now, because they relate to a different subject, which are part of the broker correspondence, that I would offer on the theory that they showed [1402] dissatisfaction with the plaintiff's methods of business, quite apart from the quality. There are inquires about his credit standing, expressing doubt as to his credit worthiness, and there are some that also object to his lack of consistent prices, his prices going all over the lot.

The Court: I know of no basis for impeachment on those so far.

Mr. Strachan: I don't say that those are—well, he says he knows of no broker dissatisfaction. I want to say, in addition——

The Court: His answer has to be read in connection with the questions asked, whether he had complaints, and so forth, and I have read the record, "and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?"

The questions were related to dissatisfaction with the product.

Mr. Strachan: Well, I do intend to offer the broker letters on these other subjects on our theory that they show a state of mind and that they go to the question of causation and they go to the question of good will.

The Court: State of mind on the part of the broker?

Mr. Strachan: Yes, sir, as expressed to Mr. Winckler in the due and ordinary course of business, as Mr. Dixon has just said, showing that in this correspondence that dealt [1403] with the problem of marketing the product, these were the reports made. I think they are admissible on that ground, too.

The Court: We will cross that bridge when we get to it.

Mr. Dixon: May I make this comment for the record? I spent all afternoon and all night last night until about 11:00 o'clock going through the material which I had had, but never had occasion to examine. I found two letters there that might deal with credit, which are the only ones I found, inquiries by two brokers, which dated back to 1949.

I don't know what other documents counsel has or expects to use, but I am merely asking them at this time if they have any additional documents other than what are contained in here and which were turned over to us by Mr. Williams after they searched these files, I would like to see them sometime in recess or at least have them presentd to us so I will know what we are going to talk about, because I have gone through the material and organized it.

The Court: Well, that will have to be done.

Mr. Strachan: You mean we must disclose to Mr. Dixon in advance of cross-examination which

documents which we secured from their files we intend to refer to?

The Court: If the document is offered for impeachment purposes, no. If the document is offered for some of these other purposes, then to speed up the trial, if for no other [1404] reason, counsel should be advised of what evidence is going to be offered. The only exception to that rule is the impeachment rule. If a document is offered solely for the purpose of impeachment, you will not be required to——

Mr. Strachan: That requires us in effect to advise them of the scope of the cross-examination in advance, which I don't think we will be required to do.

Your Honor mentioned yesterday that there had been some ruling that all documents that were to be used for evidentiary purposes by the defendants should be disclosed to the plaintiff. I have had the record checked on that and I am advised that that was limited to this. When the plaintiffs were ruled upon to give access to the defendants to all its records relating to transactions between the defendants and Winckler & Smith, it was provided that we should give notice of which documents in our files, our files, we intended to use, and there was nothing in the ruling that required us, after having had discovery, to reveal the defense case based on defendants' documents to the plaintiff before trial.

The Court: Well, No. 1, the pretrial in this case, of course, took an abortive turn, with which you are familiar.

Mr. Strachan: And I hope nothing else in the case takes such a turn, because it was a very unfortunate turn.

The Court: Secondly, there is a pretrial order, general order, that was made. I imagine it was made in this case. [1405] It is a very short pretrial order which we customarily make. I don't know whether it was actually filed in this case or not, but it provides——

Have you the form of it there, Mr. Clerk?

I assume this was made early in the case, although it could not have been, because it came from Judge Byrne, and he has a different kind of order. I don't know whether he made this order or not.

"It is further ordered that not later than seven days prior to pretrial hearing, counsel for the parties confer to ascertain what matters may be covered by stipulation, what documents each party proposes to offer in evidence, what may be to clarify the issues,"

and so forth.

A previous portion read:

"The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. So far as practicable all documents which either side expects to offer in evidence, excluding proof which may be offered by way of impeachment, shall be produced for examination at this hearing."

That is the customary pretrial order in this court. I won't say whether that order was heretofore made or not in this case. It will be made now. You will be

exempted from [1406] exhibiting matters which you intend to offer for impeachment.

As to other matters that you offer as part of your case, I don't care whether you offer them as part of cross-examination or whether you offer them on direct, but counsel on the other side should be advised what these documents are and not merely be given the answer, "They came out of your [1407] files."

One very obvious reason, of course, is that this is a corporation in a bankruptcy proceeding. It is not a going business. We all know what the state of its files are, and the fact that you merely say the document came out of your file is not sufficient.

To avoid delay in the trial as we proceed, counsel should know what these documents are, except impeaching documents.

There is nothing strange or startling about that rule.

If we had carried on with our pretrial we probably would have had all these documents either numbered, or tagged and exhibited, before we ever started in.

Mr. Strachan: We will certainly make every effort to do what your Honor has required here.

I want to say this. By reason of the fact that I have been active in this case for only about a week, I haven't fully selected the documents, but as soon as I know what documents we intend to introduce, I will give them to Mr. Dixon or give him an identification of them.

The Court: That would be very helpful, and as you well know, it will speed up our trial.

Mr. Strachan: I would like to have it speeded up, because I think, in general, delay is harmful to the defense as well as to the plaintiff.

The Court: This goes for the plaintiff, too. So far I haven't seen anything that the defendants weren't aware of [1408] that you asked for. Apparently they had it at their fingertips when you asked for it, so they apparently knew what you were going to offer. But this goes for both sides. I want documents that you are going to use exhibited prior —and I don't mean five minutes before, I mean a day or so at least before you use them—so the other side will know what you are going to use and it will avoid the necessity of reading long documents, and finding out what their position is going to be before the offer of the document. [1409]

* * *

The Court: The jury is now absent. Do you have some of these documents?

Mr. Strachan: Exhibits P and Q, you ruled on before. I would intend to reoffer those, because it indicates—— [1413]

* * *

The Clerk: No. My record shows P is not in evidence. They are being now reoffered. A reoffer of P and Q is now pending.

The Court: Does the record show what the Anagold brand Citrus Cocktail is?

Mr. Strachan: Yes, sir. It is a mixture of [1415]

orange juice and grapefruit juice, with a little lemon added, I think.

Mr. Dixon: That is the product, your Honor, that there was so much discussion about concerning the overpack in 1947, which resulted in the terrific inventory loss and the proceedings under Chapter XI in 1948, was it, or '47? '48.

The Court: Was there any testimony by Winckler on the question of whether he had any complaints as to the Citrus Cocktail?

Mr. Strachan: He said the only complaints that were ever brought to his attention were limited to the navel products.

Mr. Dixon: As I understand it, navel juice is used in the making of the Citrus Cocktail, your Honor.

Mr. Strachan: Not at all times, as I understand it. I believe his testimony was that occasionally a little navel juice was used.

The Court: Well, just to pick up a few things. "N" apparently was received in evidence. I will permit further inquiry as to what is in the Citrus Cocktail. If it turns out that this particular shipment that refers to these three buyers contains navel juice, I propose to strike the exhibit, Exhibit N, but that would depend on foundation of the matter.

Mr. Strachan: That will be a matter of redirect, won't it, if he wants to make a motion to [1416] strike?

The Court: Since it has gone into evidence, it may be handled on redirect.

Mr. Dixon: What is that? [1417]

The Court: Exhibit N, dated August 18, 1949.

Mr. Dixon: I have it right here. The whole letter?

The Court: What's that?

Mr. Dixon: The whole letter?

The Court: The whole letter went into evidence. Part of it was read, but it involves this cocktail.

Mr. Dixon: That again, I think, your Honor—may I make this comment with reference to this whole matter? As I said, I spent all last night sorting these letters out, and there are letters from the same broker—the entire correspondence, without some of these isolated letters as they would read them, would appear to make a little more sense to me. There is a reply to this letter of August 24, which I think must be read in connection with this letter to show to what it relates. I am frank to say that——

The Court: Let's see the reply.

Mr. Dixon: Here it is, your Honor. I put it together last night. That is why I object to introducing just one letter without the connecting correspondence or reply to it, if there is any, because it just takes up an insurmountable amount of time to have to go into these letters to explain them when the letter itself may cover it.

The Court: Well, since we brought this subject up, I suppose we will mark these two letters for identification and we will have them all before us when the question arises. [1418]

Mr. Strachan: Which is that, your Honor?

The Court: The two replies to your Exhibit N. N has been received in evidence. I have indicated I will hear some inquiry as to what was involved, and when I do it may go out or it may not. If it doesn't go out, there will probably be an offer of the corresponding reply letters, so I am merely asking that the two reply letters, to keep them in order, be marked N-1 and N-2 for identification.

Mr. Strachan: Not as a defendants' exhibit?

The Court: This is marked for identification. If the plaintiff offers them in evidence, we will give them a plaintiff's number, but this only concerns our mechanics. At least the clerk will have them in his file as N-1 and N-2 for identification.

Mr. Strachan: We don't happen to have copies of those here, your Honor. Will you make a note of that, Mr. Williams?

The Clerk: Shall we use your copies, Mr. Dixon?

Mr. Dixon: It is all right to use my copies. I have no objection.

The Court: Pull them off and mark them N-1 and N-2 for identification.

The Clerk: The August 24 letter will be N-1 and the February 24, 1950, letter will be N-2.

Mr. Fisher: August 24 of what year?

The Clerk: 1949. [1419]

(The exhibits referred to were marked Exhibits N-1 and N-2 for identification.)

Mr. Dixon: Now, if the court please, with reference to the one that has been marked Exhibit P, by putting in letters from Winckler & Smith on Jan-

uary 31, 1950, and February 14, 1950, the complete explanation is made. It relates to navel orange juice and here are the letters, your Honor.

Mr. Strachan: We are not to that point with our case, your Honor.

Mr. Dixon: I thought you had marked P.

Mr. Strachan: I am not marking any of Winckler's self-serving replies.

Mr. Dixon: We are not talking about self-serving.

The Court: Wait a minute.

Mr. Dixon: All right.

The Court: I am trying to unravel what has been done so far. P has not been received in evidence, has it?

Mr. Strachan: No, your Honor. As a matter of fact, there was a ruling near the adjournment last week and I am reoffering it now.

The Court: You are reoffering it. I ask you to inspect the correspondence, Mr. Strachan, that Mr. Dixon handed me to see whether or not you will agree that the letter concerned navel orange juice. that your P concerned navel [1420] orange juice.

Mr. Strachan: It relates in part to Valencia, but it also relates to Valencia packed under the Anagold brand, and for that reason we tender it as showing that the Anagold brand name was injured through the packing of the inferior product under that name.

I am sorry. I think I misspoke myself back there. It relates to the packing of the inferior navel juice under the Anagold brand. We therefore offer to show that the practice of packing navel under the

Anagold brand impaired the Anagold trade name value.

The Court: But you don't offer it for impeachment?

Mr. Strachan: Well, I think it is not impeachment as to product, but it does show, and I offer it as showing that in the ordinary course of business it was reported that the brokers had found sales resistance because of the packing of navel juice under the Anagold brand.

The Court: Your objection is the general objection you made the other day?

Mr. Dixon: The general objection, your Honor, yes.

The Court: Sustained, but before I sustain it, let us mark the other letters for identification that supplement P so we will understand what the basis of it is. The letter of January 31, 1950, from Winckler & Smith to Hansel of the Pavey Company will be P-1 for identification and the letter [1421] of February 14, 1950, will be P-2 for identification, and the objection to the offer of Exhibit P is sustained on the general grounds stated by counsel and by the court in the colloquy the other day and this morning, and on the further ground that counsel's offer indicates he wants the letter in for the purpose of showing the factual matters recited in the letter.

(The exhibits referred to were marked Exhibits P-1 and P-2 for identification.)

Mr. Strachan: No, I don't offer it as proof of any of the matters asserted in the letter.

The Court: You told me you offered it to show the broker dissatisfaction with the Anagold label, and so forth. That was the statement. We can have it read by the reporter. Read it, Mr. Reporter.

Mr. Strachan: I am showing that the brokers asserted a dissatisfaction with the Anagold label because of the fact—they said it was a fact that the inferior navel juice had been packed under that Anagold brand.

The Court: Objection sustained. Now, that takes care of P. [1422]

The Court: Q has been marked for identification. It is a letter of April 4, by Winckler & Smith to the Russell Brokerage Company. Have you found it, counsel?

Mr. Dixon: Russell Brokerage?

The Court: Yes.

Mr. Fisher: My notes have that Q is the Bagley letter.

The Court: That is because of the clerk's writing. Let us take up O. The exhibit I refer to was Exhibit O. Is it in evidence, Mr. Clerk?

The Clerk: It is according to my record.

Mr. Dixon: What is that?

The Court: Letter of April 4, 1949, Winckler & Smith to Russell Brokerage Company.

Mr. Dixon: April 4, 1949. I have it, your Honor.

The Court: This also was read in part to the jury and it involves navel juice. I will entertain now or later a motion to strike it. [1423]

Mr. Dixon: I will move to strike Plaintiff's Exhibit O from the files on the grounds it relates to

navel juice and shows it clearly from the face thereof.

Mr. Strachan: May I make a statement as to my position?

The Court: Yes.

Mr. Strachan: It is my position the portion of that read to the jury shows that Winckler was aware of the damage that would be done to the Anagold trade name if he were to pack navel juice, and his subsequent packing of navel juice under that brand name, was responsible for impairing the value of the trade name, or he did it in disregard of any claimed value of the trade name had.

The Court: Let me read it again. I see nothing in the letter that talks about packing navels under the Anagold label.

Mr. Strachan: He said it was an inferior juice.

Mr. Dixon: No.

Mr. Strachan: "I doubt whether we will do anything on navel juice. We want to be more careful than ever before. We are afraid it would be a mistake to pack navels," and he went ahead and packed navels.

The Court: Do you have proof after April, 1949, he did pack navels?

Mr. Strachan: That is in the record. The year in which he packed most of the navel juice was 1950, I think. [1424]

The Court: It is in the record. It has been read to the jury. I think the easiest thing to do is to deny the motion to strike and leave that one in.

Mr. Dixon: Then, if the court please, the other

letter that they took out of the files, October 7, 1949, shortly afterwards, to this same company should be available, I think.

The Court: I will mark the letter for identification. However, the letter you submit, Mr. Dixon, does not reply to the letter of April 4, 1949.

Mr. Dixon: That is correct, your Honor. It does, however, certainly, in my judgment, overcome any inference which counsel wishes the jury to draw from any statements that might be contained in the letter that he offered in evidence.

The Court: Mark the letter of October 7, 1949, as O-1 for identification. [1425]

* * *

The Court: Well, there is no need to make this record any more cumbersome than we have. I have indicated that I will ascertain what this blended juice was that was referred to, and if it was navel, I am going to strike the letter, so let's do that now and get on with the matter.

Come up, Mr. Winckler. You have been sworn.

Mr. Dixon, you are mixed up here. This file you handed me with the letter of July 25 does not concern N. It concerns M.

Mr. Dixon: That is correct, your Honor. That is why I was trying to get my exhibit straight, so I would know what I had.

The Court: Let's take N up here.

Mr. Dixon: N?

The Court: N.

NICHOLAS J. WINCKLER

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

The Court: Mr. Winckler, I show you Exhibit N, which has been received in evidence. It talks about Anagold brand citrus cocktail. It was written in August, 1949. It talks about Anagold citrus cocktail damaged the market when you shipped two or three years ago your Anagold citrus cocktail, on the second page. [1426]

What kind of juice went to make the Anagold citrus cocktail?

The Witness: Sometimes, your Honor, we used navel. Whenever Valencias were available, we used Valencias. That citrus cocktail juice referred to in that letter goes back to, I think, 1946. It would be impossible at this time for me to make a definite statement whether or not it was Valencia or navel.

However, I remember this letter. I didn't read it today, but I remember this letter. It is a southern broker where we didn't sell much. They complained that the customers lost money.

The Court: All right.

The Witness: Due to the price decline. [1427]

The Court: Now, M, Mr. Dixon.

Mr. Dixon: We believe the letter of July 25, 1949, your Honor, should be added to that letter, by way of explanation and clarification of what Exhibit M is referring to.

The Court: Is foundation waived on this Exhibit M-1?

(Testimony of Nicholas J. Winckler.)

The Clerk: Defendants' Exhibit M-1 marked for identification.

(The document referred to was marked Defendants' Exhibit M-1 for identification.)

Mr. Strachan: I will stipulate that M-1 is a copy of a letter written by Mr. Winckler to the addressee and sent to the addressee on or about the date it bears.

Mr. Dixon: In reply to the letter Exhibit M, counsel?

Mr. Strachan: Yes.

The Court: Do you offer M-1?

Mr. Dixon: Yes, we offer M-1, your Honor.

The Court: M-1 received in evidence.

Mr. Strachan: Might I state an objection to it?

The Court: Yes.

Mr. Strachan: My objection to the offered letter is that it has no tendency to disprove the fact, that the statement contained in Exhibit M was the assertion made, and it is offered only for the purpose of showing the assertion made.

The Court: I left M in evidence. It has heretofore been put in evidence. It is remaining in evidence because [1428] it has been offered for the purpose of impeachment, not on the ground that it proves the assertion made, or that it is offered for any of those other reasons. I have sustained an objection to that. So M was received for impeachment purposes. Now, in view of that fact what is your objection to M-1?

(Testimony of Nicholas J. Winckler.)

You can't object upon the ground that M went in for a purpose that I didn't admit it for.

Mr. Strachan: M-1 has no tendency to minimize or alter the impeachment contained in M.

Furthermore, I did not offer M-1. It should have been a plaintiff's exhibit. I object to it as not being relevant to anything contained in Exhibit M, or admissible on any issue in the case.

The Court: We permitted the objection to be made after the ruling. The ruling will stand that it has a bearing on the impeachment issue, which is the only purpose that M is in evidence for.

Now, what the record may show in front of the jury, I don't know. We may have to go back on that to indicate.

Mr. Strachan: Is M-1 going to stand as a defense exhibit?

The Court: If you object to the M-1 on it, it will be given a plaintiff's exhibit number.

What is the next number for the plaintiff, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 52. [1429]

The Court: It will be Plaintiff's Exhibit 52 in evidence, instead of M-1 in evidence.

(The document formerly marked as Defendants' Exhibit M-1 for identification was received in evidence and marked Plaintiff's Exhibit 52.)

The Court: Let me see. M, N, O, P, and Q. Have we talked about Q yet. Has Q been offered?

Mr. Strachan: Yes, I offered Q.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: If your Honor would bear with me.

The Court: It is a letter of March 22, 1950, to Winckler & Smith from Bagley & Company.

Mr. Dixon: I am somewhat at a disadvantage here, having to give up my copy and having to keep my records straight so I will know what I have got.

What about O?

The Court: O is in evidence.

Mr. Dixon: What is O?

The Clerk: The Russell Brokerage letter.

The Court: I am going to take a recess. You can look at that later on.

I am going to ask you a question about Q, Mr. Winckler.

Q has been marked for identification, it is a letter of March 22, 1950, to Winckler & Smith from Bagley & Company. Do you know what kind of juice is involved?

The Witness: Your Honor, that letter was written in [1430] March when there was no southern Valencia oranges available, and we are certain that we didn't have any Valencia carryover from the previous year, meaning 1949. At the early part of the season we sometimes send out samples which show the current condition of the pack, or, rather, a sample of the juice available, which is maybe accepted or turned down. But this merchandise has not been packed, and I would not regard this letter as a complaint.

The Court: You haven't answered my question.

(Testimony of Nicholas J. Winckler.)

Can you tell from the letter and the date and the company what the juice is that is referred to?

The Witness: I cannot state it for sure, your Honor. But inasmuch as there is no Valencia juice available in March, and navel is packed during the winter months in January and February, it is an assumption on my part that it could be navel juice.

The Court: The objection to Q is your general objection, Mr. Dixon?

Mr. Dixon: Yes, your Honor.

The Court: Overruled. It is received in evidence for impeaching purposes only. [1431]

* * *

The Court: Let the record show the jury absent.

We wound up by putting Exhibit Q in evidence for limited purposes.

Mr. Dixon: Your Honor, I am sorry. I was working on the file when this exhibit was discussed. I wish to move to strike this exhibit on the ground it refers to navel juice and that the reply of the plaintiff dated March 28, 1950, clearly so indicates.

The Court: We are mixed up here. I put Winckler on and he said he thought, but he couldn't say for sure, and I therefore took his evidence most strongly against him and concluded it might refer to something else.

Have you seen the reply, Mr. Strachan?

Mr. Strachan: Is it marked?

The Court: No, but we will mark it. The letter of March 28, 1950, to Bagley and Company by

(Testimony of Nicholas J. Winckler.)

Winckler & Smith will be marked Plaintiff's Exhibit 53 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 53 for identification.)

The Court: Is it stipulated that foundation is waived on Exhibit 53?

Mr. Strachan: I will admit it is a letter written by——

The Court: By Winckler & Smith to Bagley and Company in reply to Exhibit Q.

Mr. Strachan: Yes, and I will object to the admission [1434] of 53 on the grounds it is a self-serving statement and, furthermore, it has no bearing on the admissibility of Exhibit Q for the limited purpose for which the Exhibit Q is offered.

The Court: I am not receiving Exhibit 53 in evidence, but merely marking it for identification as part of the foundation to rule upon this motion to strike Q, but I am now going to strike Exhibit Q on the ground the foundation now made shows Q concerned navel juice and therefore it is not admissible for impeachment purposes, and I rule it not admissible under the general purposes that you have heretofore talked about as being a letter which you offer to show not the facts thereof, but merely the state of mind of the broker. Exhibit Q will be stricken.

(The exhibit previously marked Defendants' Exhibit Q was stricken by the court.) [1435]

The Court: Are we prepared to start on some of these others?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: As I understand it, we furnished, in the order that we expected to refer to them, a set of the additional exhibits. I don't know whether Mr. Dixon is going to object to each and every one or not.

Mr. Dixon: May I say to the court, your Honor, obviously I have been swamped with these exhibits, having been shown them just at this time, as to what they expect to offer in evidence.

I have here about, I don't know how many of these letters, but I have alphabetized everything so that I can get to their exhibit as quickly as I can. I think we have found about five of them, and I would suggest, your Honor, that we might save time by permitting me to go through the files here and try to match their documents.

Of course I cannot read it, even, and tell whether I am going to object to it or not, until I have it available.

The Court: I want you both to make any kind of a record you want, but I am going to rule as I have indicated. Now, it ought to be pretty easy to solve some of these problems.

For instance, this last letter Q, you probably didn't have the reply letter, so you couldn't tell from the letter what the story was. If you had had the reply letter and knew that the foundation would show navel, then of course [1436] that letter could have been laid aside with the series that involved navel, and at one time make an offer of proof of the

(Testimony of Nicholas J. Winckler.)

whole bunch, and we would have the objection and have a record made.

I know what your problem is. The difficulty is these letters involve different things. In other words, you may get a letter that would involve an admission against interest. That is a different problem. You may get a letter involving impeachment, and some of those will be admissible and some will not. I am excluding the impeachment on navel, because of the admission made. I am not excluding the impeachment on the other products. But I am excluding evidence on your—what we will call your general ground, for want of a better term. [1437]

* * *

The Court: You had better do some sorting yourselves, because apparently the plaintiffs have not gone back to dig out correspondence on these letters, unless you dug them out. Apparently you did it thoroughly enough so that you have further correspondence or replies, at least in certain cases.

Mr. Strachan: I can tell you how it happened, your Honor. I was selecting the documents that I was relying on. I regarded the replies as matters that I wasn't going to rely on, not having any bearing on the foundation, and for the most part they are self-serving and wouldn't be admissible. So I didn't select those.

The Court: They wouldn't be self-serving. A letter written back in '50, '51, before the suit was filed, when somebody kicks about the juice and the company replies and says, "Well, it is navel juice and

(Testimony of Nicholas J. Winckler.)

we are sorry about it," or something, how could that be self-serving?

Mr. Strachan: It is their own statement, their own unsworn statement.

The Court: That wouldn't make it [1438] self-serving.

Mr. Strachan: Here is another example: There is complaint against the quality of a product, other than Valencia. Winckler writes back and says, "We can't agree with you, we think that is a fine juice." That is a self-serving statement.

The Court: It might have that effect. But if you will recall, so far—there may be one exception in the case of M, where I let Plaintiff's Exhibit 52 in evidence. In this recent case I didn't admit 53. I merely used the showing made on 53—in the case of Q and 53 for identification, I merely used the showing made in 53 as further foundation to indicate whether the letter was properly in as impeachment, so I didn't admit 53 into evidence.

Mr. Strachan: Your Honor made a suggestion before the recess that I think might be productive. If Mr. Dixon will select the documents that he wants to have considered in connection with these, have them marked now—you don't have to rule on those, but if he will just sort out of the documents that we furnished to him, and in the order in which we furnished them, which is the order of proposed offer, and tell us which, if any, of those he will not object to, then we can deal only with those where he has objection.

(Testimony of Nicholas J. Winckler.)

The Court: I think he can do that. As you bring the letters up, he will know whether he has an objection. But I think you will have to go through your letters to avoid a [1439] situation like Q, where we had Q coming along and I admitted it on the basis of the fact that I couldn't tell whether it was navel or not, and Winckler when I questioned him said he wasn't sure, that he didn't think it was. Maybe it was. I don't know. But then in came the reply which indicated that it wasn't anything but navel juice. So, clearly, in trying to be consistent under the ruling I have made, Q shouldn't have gone in evidence, and I wouldn't have had to strike it. [1440]

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, on your direct examination you testified that you packed lemonades, orangeades, you were the first to can those in canned form. Do you recall that?

A. Yes, I do. On lemonade, not on orangeade.

Q. Not on orangeade?

A. My statement was restricted to lemonade.

Q. But you did pack orangeade, too?

A. Later on, but not first.

Q. You also had a product known as Citrus Punch; was that regarded as an ade or not?

A. Yes, it was. It was a beverage, beverage base.

(Testimony of Nicholas J. Winckler.)

Q. What was the composition or formula used in making these ades, bases?

A. Well, every ade or base was, of course, different. [1446] The lemonade base consisted of lemon juice, concentrated lemon juice and sugar. The orangeade consisted mainly of concentrated orange juice, sugar, and probably some oil of orange. I don't know the exact formulas, but that is approximately. And Citrus Punch, as the name implies, contained various fruit juices, and sugar, of course, such as orange, lemon, lime, probably grapefruit. It is stated on the label.

Q. Did you control the composition of these ades in such way that it would be uniform with respect to acidity and the other constituents?

A. Well, our laboratory certainly did. It is just a customary procedure in any food manufacturing plant that a product of that nature should be of uniform quality as far as humanly possible.

Q. Was any citric acid used in any of these products to bring it up to the required acidity?

A. Probably it was, or it wasn't. I don't know. But you have the labels, and the ingredients copied on the label states exactly what was used.

There is even a can displayed among the exhibits, if I recall correctly.

Q. Well, if you were making a standard product and a batch of it came through with substandard acidity, would there be citric added to that to bring up the acidity?

A. On what product? [1447]

(Testimony of Nicholas J. Winchler.)

Q. On any of these ades, orangeade, lemonade, or Citrus Punch.

A. I am going to take the label back, if it is permissible, and I am going to refresh my memory by looking at the labels.

The Court: Well, read the question again. If you know. If you don't know, say so.

Read the question, Mr. Reporter.

(The record was read by the reporter.)

The Witness: On lemonade, definitely no; on orangeade and Citrus Punch, probably yes; I am not certain. [1448]

Q. Do the orangeade labels and the citrus punch labels say whether or not they contain citric acid?

A. If I have a moment, I will check it.

The Witness: Mr. Clerk, may I have the exhibit of the 12-ounce can? I think you have it right here on the table, the smaller blue can.

The Clerk: Exhibit 47?

The Witness: That is it. Thank you. May I read?

Mr. Strachan: Surely.

The Witness: This lemonade contains filtered water, real lemon juice and sugar. No preservative or artificial color added.

And then it also states in prominent lettering Vitamin C enriched, so it contains added Vitamin C, and the proportion of the Vitamin C which is added is stated on the back of the can.

Q. (By Mr. Strachan): There is no citric acid mentioned on that label?

(Testimony of Nicholas J. Winckler.)

A. No. I stated before that on the lemonade there is no citric acid added.

Q. What about the orangeade label? Does that label show citric acid added?

A. I am trying to find it. Just a second. Here is the orangeade. Yes, on the orangeade the label shows citric acid added, and I read again. Ingredients: filtered water, [1449] orange juice, sugar, dextrose, orange emulsion, citric acid, Vitamin C, U. S. certified color.

You see, that is a beverage just like 7-Up or Coca-Cola. That isn't a fruit juice, so the addition of these ingredients is permissible if stated on the label.

Q. You announced the offering of these ades in the summer of 1950, as I recall, is that correct?

A. Yes, I think so.

Q. And you obtained a plant in Brooklyn for the manufacture and packing of ades, and so on?

A. Well, we didn't obtain a plant, but we made custom packing arrangement with a plant in Brooklyn for the so-called ready-to-use beverages, which means not the small concentrated cans, to save freight. Instead of packing it at Anaheim in our former plant and then shipping the water and sugar and cans and all the ingredients which are obtainable in the East, as well as here on the coast, we made arrangements that we would ship the ingredients which are produced in our plant, and then the merchandise would be finished and put into cans in that plant in Brooklyn. I think we canned a very negligible quantity of these products.

(Testimony of Nicholas J. Winckler.)

Q. And then after you had manufactured these ades, you put consignment stocks in warehouses at various places in the United States, didn't you?

A. Yes, at some markets. [1450]

Q. At how many points did you have consignment stocks in warehouses?

A. I wouldn't have the slightest idea.

Q. Do you have any idea what quantity was made in 1950?

A. No, I do not, without looking at the records.

Q. These ades are more or less a seasonable article, are they not, primarily a summer drink?

A. Well, I would say all beverages, alcoholic or non-alcoholic, sell more readily during the summer months than during the winter months.

Q. When the fall came along, you had on hand in a number of warehouses unsold stocks of these ades, is that correct? A. Yes, like anybody else.

Q. And you offered to reduce the price on those in October in order to move them out of the warehouses, isnt' that a fact?

A. Like most people do. [1451]

Q. You wrote to numerous brokers in October offering them reduced prices in order to move the ades, I believe; is that correct?

A. Well, I don't know if I wrote. Maybe our sales department.

Q. Winckler & Smith did, is that correct?

A. Well, it would be unnatural if they wouldn't.

Mr. Strachan: I will ask that these three documents, being three letters dated October 23rd, signed

(Testimony of Nicholas J. Winckler.)

by the company, and addressed to Hullar-Craig of New York, Syracuse, New York; Poole & Company, Boston; and Smith & Swinton of Cleveland, be marked as a defendants' exhibit.

The Clerk: As one exhibit?

Mr. Strachan: Yes.

The Clerk: Defendants' Exhibit R, for identification.

The Court: Exhibit R.

(The documents referred to were marked Defendants' Exhibit R for identification.)

Q. (By Mr. Strachan): I show you the three letters and ask you if you recognize those as a form of letter that was sent out on or about October 23rd to the brokers in regard to the ade products.

A. I see these three letters are practically identical.

Q. Yes.

A. Yes, I can identify them. [1452]

Q. And those letters offer a 50 cents a case price concession to move the stock immediately, is that correct?

A. Yes, 50 cents a case on four dozens, or 12½ cents a dozen. It is a very moderate price reduction.

Mr. Strachan: I suggest that the volunteered statement be stricken, your Honor.

The Court: It may go out.

Mr. Strachan: I will offer the exhibit in evidence.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: If the court please, I think the exhibits are clearly irrelevant and immaterial and add nothing to the issues in this lawsuit. I therefore object to them on that ground. The witness has testified that he had inventories at the close of the season. I don't know what these letters add to the testimony.

The Court: The objection is overruled. I, also, am in doubt. It is a close question. They may have some evidentiary value. Exhibit R received in evidence.

(The documents referred to were received in evidence as Defendants' Exhibit R.)

Q. (By Mr. Strachan): In November of 1950, you had come to the conclusion that that was the wrong time of year to try to move the ades and asked that the brokers remove all offerings and wait until the next spring to reoffer, the ades; is that correct?

A. Well, I don't know how many letters do you have in [1453] your possession which state that. Because that would be the only way that I could answer that question. Maybe in some market we reached such a conclusion; in other markets we decided to sell it and not to hold it until next year, depending on whether or not we wanted to force distribution in a market or not. [1454]

Mr. Dixon: I might say, if the court please, that there is a reply to this letter of October 23, which counsel has, and also, I think, a reply to the other

(Testimony of Nicholas J. Winckler.)

letter, which I think ought to be exhibited in all fairness to this witness if he is going to pursue this line of inquiry.

The Court: Let's see the letter. You are talking about Exhibit R now?

Mr. Dixon: Inquiring about something over five years ago.

The Court: Well, these may be the letters counsel is now referring to. I don't know. Go ahead and let's see.

Mr. Strachan: Here is a series of letters written by Winckler-Smith that I would like to have marked as a group. November 1, 1950—— [1455]

* * *

The Clerk: There are five letters all together in the group. It will be Defendants' Exhibit S for identification.

* * *

Q. (By Mr. Strachan): Mr. Winckler, I show you the five letters that have collectively been marked Exhibit S and ask you if you recognize those as letters written by Winckler-Smith to brokers at Salt Lake City, Boston, Syracuse, Fargo, North Dakota, and Louisville, Kentucky.

The Court: It is stipulated these letters came from the files of the plaintiff?

Mr. Dixon: Yes, your Honor.

The Court: All right. Do you recognize them, or not? [1457]

The Witness: Yes, I do.

The Court: All right. Ask your next question.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Those letters state as follows, in substance, do they not—I am reading from——

The Court: Just a minute. Do you want to offer them in evidence?

Mr. Strachan: I beg your pardon, your Honor. I offer them in evidence.

The Court: Mr. Dixon, they have been offered in evidence.

Mr. Dixon: No objection, your Honor. Well, wait a minute.

The Court: Exhibit S received in evidence.

(The documents referred to were received in evidence and marked Defendants' Exhibit S.)

Q. (By Mr. Strachan): "We have come to the conclusion that this is the wrong time of year to try to move the merchandise and therefore are suggesting that you withdraw any offers you have made at reduced prices and continue to offer lemonade according to the list price. We feel that the bulk of the warehouse charges have already been paid, and we will if necessary sit on the merchandise until next spring when we are sure the movement will become very good in your area."

That is correct, isn't it?

A. That is correct. [1458]

Q. Can you tell us approximately the volume of merchandise that was then consigned to warehouses and was carried over until the following spring?

A. I think, counsel, you asked me that question

(Testimony of Nicholas J. Winckler.)

before, and my answer was that I can't tell you. I don't know. [1459]

* * *

The Clerk: I have marked Exhibit T.

(The exhibit referred to was marked Defendants' Exhibit T for identification.)

The Court: Do you have your copy in your hand?

Mr. Strachan: Yes, your Honor.

The Court: Let me look at them. T was the number assigned, Mr. Clerk?

The Clerk: T, yes.

Mr. Dixon: I have the copies, counsel. Are they offered in evidence, your Honor?

The Court: No. Is it stipulated that the three letters attached to Exhibit 2 came out of the files of the plaintiff?

Mr. Dixon: So stipulated, your Honor, yes.

The Court: Do you offer them in evidence?

Mr. Strachan: Not at this time. I want to show them to Mr. Winckler. [1460]

The Court: All right.

Q. (By Mr. Strachan): Mr. Winckler, in the spring and summer of 1951, you renewed your efforts to sell this merchandise, did you not?

Mr. Dixon: What merchandise, counsel? Are you speaking about particular merchandise referred to in these other letters?

Mr. Strachan: The ades that were carried over from the previous summer.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: I object to this question, your Honor, unless it is relating to these previous letters that he put in evidence.

The Court: He has stated he is referring to the ades which had been carried over.

What is your answer? Yes or no? Did you in the spring of 1951, renew your efforts?

The Witness: Every manufacturer is always trying to sell his merchandise.

The Court: Just answer the question.

The Witness: Yes.

The Court: All right. [1461]

Q. (By Mr. Strachan): Did you receive any reports from any of the brokers with respect to their ability or inability to sell these ades at the prices that you authorized during the summer of 1951?

A. I am certain that we received from the brokers some kind of reports.

Q. I show you the three letters that have been marked as Exhibit T and ask you if you recognize those.

The Court: It has been stipulated that they came out of the company's records, counsel.

Mr. Dixon: If the court please, since this is apparently being given to this witness, and since counsel knows that there are letters that preceded these, or in reply to them, I suggest that the reply, either preceding or antedating this exhibit, should also be exhibited to this witness.

The Court: Just wait a minute now.

Do you recognize the letters?

(Testimony of Nicholas J. Winckler.)

The Witness: Yes, I do.

The Court: Ask your next question, Mr. Strachan.

Q. (By Mr. Strachan): Does that refresh your recollection as to the price at which you authorized any of the brokers to try to dispose of this merchandise?

A. I am reading the second letter now, if I may.

Q. Pardon me. [1462]

A. Yes, I remember those.

Q. What was the price at which you had authorized the sale of this merchandise, these ades, in the summer of 1951?

A. Well, I couldn't make a general statement. The price varied in territories to meet competition. In one territory it was higher, and in another territory it was lower.

Q. What was the lowest price f.o.b. Anaheim that you can recall having quoted?

A. I don't know.

Mr. Strachan: I will offer Exhibit T in evidence.

Mr. Dixon: I object to the exhibit, your Honor, on the ground it is wholly irrelevant and immaterial to any of the issues in the lawsuit.

The Court: You made what we call a general objection at some length the other day.

Mr. Dixon: Yes, sir.

The Court: Do all counsel know what I am referring to?

I am just wondering if we can't save time and repeat that objection by reference. Can that be done?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Certainly, as far as I am concerned.

The Court: We are talking about the objection made, it must have been Friday, wasn't it?

Mr. Dixon: Furthermore, your Honor, on the ground that the exhibit does not contain——

The Court: Just a minute. It was along about the time [1463] of the exhibits M, N, O and P, somewhere in there, there was a lengthy objection made. Counsel agrees that may be repeated by reference. Now, do you have further objection?

Mr. Dixon: I do, your Honor, on the ground that the exhibit offered does not contain the reply to the letter of July 16th from the plaintiff—I believe that was the one you offered, wasn't it, counsel, July 16, 1951?

Mr. Strachan: There are three letters. One is May 3rd, one July 16th, and one was November 21st.

Mr. Dixon: All right. Objection to the one of July 16th is on the ground that the reply thereto, dated July 18th, from the plaintiff, was not made a part of said exhibit; on the ground that the letter dated November 21, 1951, to the plaintiff did not contain all of the correspondence in connection with that letter, particularly the reply of the plaintiff to the Davenport Brokerage Company, dated December 26, 1951; and on the ground, as to the exhibit dated May 3, 1951, that it did not contain the letter addressed to Davenport Brokerage Company by the

(Testimony of Nicholas J. Winckler.)

plaintiff, to which the letter of May 3, 1951, was a reply. [1464]

The Court: Your purpose in this offer is what, Mr. Strachan? You had dual bases for some of these offers. Is the offer on the basis of the matter we discussed this morning?

Mr. Strachan: Yes.

The Court: Objection sustained.

* * * *

(The following proceedings were had at the bench outside the hearing and presence of the jury:)

The Court: Can we have this understanding, that we can refer to Mr. Dixon's general objection as the long objection that was made, plus the additional objections that might be pertinent?

Mr. Strachan: Yes.

The Court: And when he makes the general objection, that will take care of that. It will be incorporated by reference.

And on your side, you indicate the letters are offered either for impeachment, admissions against interest, or as circumstantial proof of intent of the brokers, state of mind of the brokers. [1465]

Mr. Strachan: Or, if you want to shorten it up even more, I will say they are offered on the theories we discussed before you this morning.

The Court: That theory is the state of mind of the brokers with reference to handling these products.

Mr. Strachan: That is part of the grounds.

(Testimony of Nicholas J. Winckler.)

The Court: When we talk about what we discussed this morning, that is what we are talking about. We had some slop-over on impeachment, and so forth.

Mr. Strachan: Yes.

The Court: But the understanding of the discussion we had this morning was the state of mind.

Mr. Strachan: That's right.

The Court: Now, as to this Exhibit U, it is stipulated that these came from the company's files?

Mr. Strachan: Yes, your Honor, all of them.

The Court: And they are offered on the basis of the matters discussed this morning?

Mr. Strachan: That is correct, your Honor.

The Court: And you make the general objection thereto?

Mr. Dixon: General objection. I haven't seen the particular ones, but I assume the general objection will apply.

Mr. Strachan: You can look at this copy.

Mr. Dixon: I don't want to take the time. [1466]

The Court Objection sustained.

(The following proceedings were had in the hearing and presence of the jury:)

The Clerk: I will mark these Defendants' Exhibit U for identification.

(The exhibit referred to was marked Defendants' Exhibit U for identification.)

The Court: I think the jury should be informed

(Testimony of Nicholas J. Winckler.)

the objection is sustained to Exhibit U for identification.

Q. (By Mr. Strachan): Do you recall that in July, 1924——

The Court: 1924?

Mr. Strachan: Pardon me, your Honor.

Q. ——July 24, 1951, you had an inventory in several warehouses in the Middle West that you would like to dispose of in Chicago?

A. Inventory of what?

Q. Of the ades and bases. A. Could be.

Q. Do you remember that in July your list price on lemonade and orangeade in 12/46 packages was $2.60 f.o.b. Anaheim, and that you were offering to sell those ades in Chicago at a delivered price of $2 a dozen?

A. I don't remember, but if there is correspondence to that extent, maybe you know more about it. [1467]

Q. Do you remember that in August you quoted an even lower price than that, namely $1.70 per dozen delivered in Chicago?

A. I don't remember, but if I see the letter I can identify it.

Mr. Strachan: I ask that these two letters to Calkins & Company in Chicago, dated, respectively, July 24th and August 1st, 1951, be marked.

The Court: Exhibit V for identification.

The Clerk: Defendants' Exhibit V.

(The documents referred to were marked Defendants' Exhibit V for identification.)

(Testimony of Nicholas J. Winckler.)

The Court: Is it stipulated that these letters came from the files of the plaintiff?

Mr. Dixon: So stipulated, your Honor.

Q. (By Mr. Strachan): I ask you to examine the documents that have been marked Exhibit V?

A. What is the question, please?

Q. Does that refresh your recollection that the product that was listed at prices of two-sixty f.o.b. Anaheim was offered for a dollar seventy delivered in Chicago as of August, 1951?

A. Yes. It was a very small inventory, as you see, only 259 cases, and we wanted to close it out.

Mr. Strachan: I will offer the Exhibit V in evidence, [1468] your Honor.

Mr. Dixon: Well, no objection, your Honor.

The Court: Received in evidence as Exhibit V.

(The documents referred to were received in evidence and marked Defendants' Exhibit V.)

The Clerk: I am marking Exhibit W for identification, your Honor, two letters.

The Court: Exhibit W marked.

(The documents referred to were marked Defendants' Exhibit W for identification.)

The Court: Is it stipulated that the letters in Exhibit W for identification came from the plaintiff company's records?

Mr. Dixon: So stipulated.

Q. (By Mr. Strachan): Mr. Winckler, I think you testified earlier in this case that after the inventory losses you took on the Citrus Cocktail,

(Testimony of Nicholas J. Winckler.)

which was packed, I believe, in 1946 or '47, you established a policy of never packing for inventory, but only packing against placed orders; do you recall that testimony?

A. I recall that testimony. However, the testimony applied only on Valencia orange juice. It does not apply to bases or beverages. It applied to products which are of seasonal nature as far as the crop is concerned. [1469]

Q. Now, why do you apply that only to the seasonal nature of the crop and not Valencia oranges?

A. There is a very good explanation.

Mr. Dixon: Just a minute. I object to the question, your Honor, as wholly irrelevant and immaterial to the issues of this lawsuit and not tending to prove or disprove any issue.

The Court: Overruled.

The Witness: There is a very good reason for it. The Valencia crop comes in, as it was discussed here in the court before, around July, and the Valencia season ends after November 1. Immediately following such date Florida starts processing citrus juice. Consequently, the inventory then packed would carry from November to the next Valencia orange season, would be subject to the price fluctuation imposed on by the much larger Florida pack. In other words, if Florida decides to cut the price by 50 per cent, that automatically would influence the California price crop, except for such people like TreeSweet, who have the fruit

(Testimony of Nicholas J. Winckler.)

on consignment. They can afford to carry inventory on orange juice, but not a packer who has to pay cash for it.

On the other hand, Florida does not pack lemonade and to my best knowledge at that time Florida did not pack any concentrated beverage bases, so there the inventory is not subject to Florida price policies. [1470]

Q. When did Florida ever pack citrus cocktail?

A. Well, I am not aware that Florida ever packed citrus cocktail.

Q. There also was an instance in which you did pack citrus products for inventory and consigned them to a warehouse, and that was not your policy with respect to Valencia juice, is that correct?

A. That is correct, and my testimony referred only to Valencia juice, about not packing inventory since 1946.

Q. Citrus cocktail was not Valencia juice, that was a beverage, and you packed that?

A. Citrus cocktail, as was explained in my testimony before, is basically speaking a pure citrus juice, a blend of orange and grapefruit, with addition of a little lemon, but does not fall in the category of a beverage.

Mr. Strachan: I will offer Exhibit W in evidence.

Mr. Dixon: General objection, your Honor.

The Court: Exhibit W received in evidence.

* * *

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Reading from the first page of Exhibit W, this is addressed by Winckler-Smith to S. A. Wortier of New Orleans, Louisiana.

"We are in receipt of your wire informing us that Hill has offered $1.25 for 12/46 ounce [1471] and 50 cents per dozen for the 12-ounce for the entire stock, which includes 390 cases 12/46 oz. of lemonade, in the E. D. Cambon Company warehouse, and 24 cases 12/46 oz. and 3 cases 48/12 oz. of lemonade in the Maloney warehouse.

"We accept this offer for immediate sale and agree to Cambon invoicing the total sale, deducting his warehousing bill of $341.82, and remitting the balance to us.

"As per our telegram, we ask that you please forward your order to us covering this sale so that we can forward brokerage to you covering the sale of the entire quantity.

"We have taken a severe whipping in disposing of this inventory at this price but we are accepting this loss in view of the fact that it would cost considerable to move the inventory to another location. When you consider the manufacturing cost of this merchandise, plus the shipping charges and storage charges, plus brokerage selling cost, you can see how we come out on the deal."

Q. Mr. Winckler, are you able to state to the court and jury the entire cost and loss involved in having packed for inventory these ades that we have been discussing?

(Testimony of Nicholas J. Winckler.)

A. You mean the total?

Q. The total cost to Winckler-Smith. [1472]

A. I am unable, that is quite obvious.

The Court: You are talking now about overall loss for all ades packed?

Mr. Strachan: On this whole are project.

The Court: You are not talking about the 300 or 400 cases shown there?

Mr. Strachan: No. I am talking about the entire loss on the total ade program.

The Witness: I couldn't state it, of course. However, it was very nominal, because these inventories were all very thinly spread, two or three hundred cases in one market.

Mr. Strachan: I move to strike his statement that it was very nominal.

Mr. Dixon: I think he is entitled to——

The Court: Overruled.

* * *

Q. (By Mr. Strachan): Mr. Winckler, you testified several times, I believe, that you didn't in the canning season of 1951 process any single strength Valencia juice, is that [1473] correct?

A. That is correct to my best recollection.

Q. Did you have any single strength juice that you carried over as inventory into 1951?

A. Probably some Florida juice.

Q. Any California juice?

A. Not that I remember.

Q. Do you recall that you ever offered any

(Testimony of Nicholas J. Winckler.)

Valencia single-strength juice for sale on the West Coast in 1951?

A. Oh, yes, I did. We did, I mean.

Q. Although you had none in inventory?

A. That is correct. We tried still to sell and to produce.

Q. When you first started this citrus fruit business you bought a considerable part of your fruit from Sunkist, did you not?

A. You said when I started the citrus group business?

Q. Citrus fruit business.

A. Juice business?

Q. Yes.

A. Yes, we bought considerable fruit from Sunkist.

Q. And how long was it, in what period was it that you bought a considerable part of your raw fruit from Sunkist?

A. 1945, '46, '47, and '48. [1474]

Q. That was down to the time when you went into the reorganization proceedings in '48, is that correct?

A. Including the reorganization proceedings.

Q. At the time that you went into the reorganization proceedings, were you buying from Sunkist on credit, or cash?

A. I don't remember for sure. If the terms were changed, they were changed just shortly before we were ready to go into reorganization.

Q. Originally you bought an open account credit,

(Testimony of Nicholas J. Winckler.)

is that correct? A. That is correct.

Q. Then shortly before you went into reorganization proceedings the terms were changed so that you paid cash?

A. Well, I would like to qualify the word "cash." It means that instead of getting a week's credit, if I remember correctly, we reached an understanding that we are going to send a check daily for the fruit which is delivered every day.

Q. That is, you would pay the same day for the fruit received, was that the arrangement?

A. Yes.

Q. So at the time you went into the reorganization in 1948 you didn't owe Sunkist anything for fruit, did you? A. Not that I recall.

Q. When you came out of reorganization proceedings after having sold the property with a lease-back arrangement, [1475] sold the plant and equipment under that lease-back arrangement, on what terms did Sunkist offer to sell you fruit?

A. If I recall correctly, they wanted a cashier's check.

Q. At the time the fruit was delivered?

A. Either at the time or prior to delivery.

Q. You had other sources of supply of raw fruit, did you not?

A. Well, we had the other source of supply.

Q. What do you mean "the other"?

A. Well, I think it was testified here by other witnesses in the court that there are, basically speaking, two sources of supply, the Independent

(Testimony of Nicholas J. Winckler.)

Fruit Growers and Sunkist, so the other source of supply was the Independent Fruit Growers.

Q. That was the source that was represented by Morgan Ward as its broker, is that right?

A. Well, I wouldn't use the term broker. I would say he is the general sales representative over a period of many years.

Q. Will you tell us what terms of payment were arranged between you and Morgan Ward for the period immediately following your reorganization and adjustment with creditors in 1948?

A. What do you mean "immediately following"? You mean for the next few months or for the next two years or what [1476] term would that question include?

Q. I will change the question. After the reorganization and the resumption of operations by the corporation, you made arrangements to acquire fruit from the Independent Fruit Growers represented by Morgan Ward?

A. That is correct.

Q. Did you negotiate the terms of payment with Ward at that time?

A. I don't know exactly at what time. I won't be held to two weeks or three weeks. But generally speaking during the 1949 packing season, which was our first year, and we were operating after completing the reorganization under Chapter XI, we got very liberal credit arrangements with the Independent Friut Growers.

(Testimony of Nicholas J. Winckler.)

Q. Can you tell what the terms of payment were?

A. They are not always the same. Generally speaking, the terms were that we have to pay our bills weekly or up to 10 days. Sometimes arrangements were made where we bought fruit subject to that we won't pay for 30 days, and sometimes special arrangements were made like, for instance, when we packed for the school lunch program, that we are going to pay for the fruit when we get the proceeds from the Government, which maybe took some time two months.

Q. Did the arrangement that you negotiated with Morgan Ward provide that you would pay the independents not only [1477] the price of the fruit per ton but a $1 a ton in addition, which was to be applied to liquidating the unpaid indebtedness to the independents as a result of the reorganization proceedings?

A. If you will be kind to recall, I made the statement previously that according to my best recollection we paid all the small creditors in full, so that was a voluntary offering like to any other creditor in this category, that we wanted to make good and pay them voluntarily every dollar that we owed them, and we did.

Q. Well, isn't it a fact that you arranged with Morgan Ward that you would pay a dollar above the price of the fruit for every ton until the loss that had been sustained in your reorganization proceedings had been wiped out?

(Testimony of Nicholas J. Winckler.)

A. You are saying the same thing that I do. I don't recall if it was a dollar a ton or two dollars a ton or 50 cents a ton, but I know, assuming that the dollar a ton is the correct one, I don't recall, anyhow, that $2,000 was paid up very quickly, I think within six weeks that we started to [1478] pack.

The Court: Well, counsel is asking this question: Assuming you paid a dollar a ton, or two dollars, whatever it was, extra to Morgan Ward, did Morgan Ward and you bargain for that, or did you do it voluntarily?

Is that what you are asking, counsel?

Mr. Strachan: I am just asking him what the arrangement was.

The Witness: That was a voluntary——

Mr. Strachan: I am not asking about negotiations.

The Witness: That was a voluntary offering that we made to these creditors, and Morgan Ward was one of them, and it was greatly appreciated. There was no demand made, no bargaining. It wasn't a condition of the deal.

The Court: Now, counsel, you say your question was what were the arrangements; but I take it that is what you were getting at. If you had some other matter that you were getting at, you may go ahead.

Q. (By Mr. Strachan): In addition to Sunkist and Morgan Ward there were other sources of supply available to you, were there not?

(Testimony of Nicholas J. Winckler.)

A. Well, I would not say there were sources of supply. I think we had testimony here that there were two other groups, one co-operative called Mutual Orange Distributors, who at that time had their own citrus packing plant, juice plant, and it was very seldom that they had a surplus of [1479] fruit over and above what they needed for their own plant. A second group which was discussed here was the American Fruit Growers. They are not a co-operative, but they are in the produce business, and they built, if I recall correctly, in 1949, or shortly thereafter, a plant of their own. So fruit from them was very seldom available. Which does not mean that occasionally we may not have been successful in picking up a few truckloads. But it cannot be regarded as a steady, permanent source of supply on which a manufacturer could rely.

Q. Don't you know, as a matter of fact, that in each of your crop years, '49, '50 and '51, that you actually secured more fruit, more tonnage of fruit from these other sources, than you did from Sunkist? A. Oh, yes.

Q. I am not talking about Morgan Ward; I am talking about the other two, the sources other than Morgan Ward and Sunkist.

A. Well, the question is if I know. The answer is I don't know, but it would be meaningless because we bought so little from Sunkist. So if these other sources were a few per cent more or a few per cent less than Sunkist, it wouldn't have any importance.

(Testimony of Nicholas J. Winckler.)

The importance is the bulk of our supply was secured from the Independent Fruit Growers.

Q. Is it a fact that in the crop year—take [1480] the fiscal year ended with January of 1950, that is the packing year of 1949, that you obtained 10,500 tons of your raw fruit from Morgan Ward, and 3,500 from Sunkist, and 4,300 from sources other than Sunkist and the Independent.

A. Would you be kind enough to repeat these figures?

The Court: Read it, Mr. Reporter.

(Question read by reporter.)

Mr. Dixon: What was the question, oranges or fruit?

Mr. Strachan: Total fruit.

Mr. Dixon: What do you mean—oranges, navels?

Mr. Strachan: Valencias, navels, grapefruit, and lemons.

The Court: The question will be understood to mean fruit generally.

The Witness: Well, that totals 18,300 tons. I just wanted to check if it would approximately check out right. I think it is correct. Without looking at the records I would not be able to say if these figures are correct or not, but '49 was a year when fruit was plentiful, and the fact that—if that figure is correct, and we did obtain out of the 18,300 tons, 4,300 tons, which is approximately 20 per cent or 23 per cent, from other sources, but the

(Testimony of Nicholas J. Winckler.)

two main suppliers, it would have no bearing for the later years to come, '50 and '51. [1481]

Q. All right. Let's take the next year, which is the packing year of 1950, your fiscal year ended with January, 1951. A. Okay.

Q. Isn't it a fact that in that year you obtained three times as much tonnage from sources other than the Independents and Sunkist as you obtained from Sunkist?

A. Will you be kind enough, counsel, to give me the three figures just like you gave me in 1949, that I can compare it?

Q. Yes.

The Court: This is fruit generally, too?

Mr. Strachan: Yes, total raw fruit.

Q. 11,500. A. From whom?

Q. From Independent. A. Okay.

Q. 1,300 from Sunkist? A. Yes.

Q. 4,100 from sources other than Sunkist and Independent.

A. Probably it would simplify my answer if you could tell this court, counsel, how you figure the 4,100 other than Independents and I like to give an explanation, if I may do so.

The Court: Well, can you answer the question as it [1482] stands now?

The Witness: I cannot.

Q. (By Mr. Strachan): Your answer is you don't know?

A. I don't know, but I like to be helpful and clarify it.

(Testimony of Nicholas J. Winckler.)

Q. Now, for the next year, which is the fiscal year ended with January, 1952——

The Court: This is the packing year 1951, right?

Mr. Strachan: Yes.

Q. ——your total fruit purchases were approximately 6,000 from the Independents?

A. Yes.

Q. This is tons? A. Yes.

Q. 715 tons from Exchange.

A. From Sunkist, you mean.

Q. Sunkist, right, and 1,455 from sources other than Independent and Sunkist, making a total of about 8,100 tons.

Mr. Dixon: That is all kinds of fruit, counsel?

Mr. Strachan: Yes.

The Witness: I like to make the explanation——

The Court: Well, is this correct, or do you know?

The Witness: I coudn't answer it, your Honor, without that I can explain the third category in all three years.

Q. (By Mr. Strachan): Well, what were the sources that [1483] are included in that third category other than Sunkist and Independent?

A. It is quite likely that the big percentage of that third category is also the Independent Fruit Growers, and my explanation to that is that the Independent Fruit Growers are made up of a great number of packing houses. They are a voluntary association. They are not bound by any kind of rules or regulations. If they want to offer their

(Testimony of Nicholas J. Winckler.)

fruit through Morgan Ward, they may do so. If they want to sell their fruit directly to a juice packer, they can do so, and I know that each year there were certain independent fruit growers who were not willing to sell through Morgan Ward and said, "I won't wait for my money two months until you get it from the school lunch program. If you can use my fruit and pay to me within a week or five day, I give it to you."

So this third category of 4,300, 4,150 and 1,455 in 1951, my assumption is that these figures include a number of independent packing houses who have not sold their fruit through Morgan Ward, but are still members of the Independent Fruit Growers.

Q. Well, along that line, would you say that in this third category there was no fruit in any of these years from Mutual——

A. No, I would not say that. I said just the opposite. If you recall, I said here 15 minutes ago, while there are [1484] two basic sources of supply, that does not mean that we couldn't pick up some fruit occasionally from the remaining two sources who had their own manufacturing plant. One was the American Fruit Growers, later on doing business, also, as Golden Citrus Juices, and the other was Mutual Orange Distributors, doing also business as Real Gold Products Co. The latter two names are the names of the manufacturing divisions of these organizations.

Q. Well, in the light of your explanation, would you say that for the purpose of this lawsuit we

(Testimony of Nicholas J. Winckler.)

could fairly treat that third group as a part of the Morgan Ward independent group?

A. No, I wouldn't go so far. I would say that it is probably made up of some members of the Morgan Ward group and some of these other sources which I mentioned before.

Q. But you don't know how much would be independents belonging to Morgan Ward, MOD, or American Fruit Growers?

A. How could I, going back seven years, without seeing the records, books, or anything like that?

Q. Well, from 1949, when you came out of reorganization, down to the time you closed up your business, you bought less and less percentage of fruit from Sunkist, is that correct, in each year?

A. That is correct.

Q. In the year ended with January, 1950, your first year [1485] of operation after reorganization, you bought 17½ per cent from Sunkist—I am talking about Valencias now only.

A. Now we are changing to Valencias?

Q. Valencias, yes. As far as Valencias are concerned, isn't it true that in the first year following your 1948 reorganization proceedings, you bought approximately 17½ per cent from Sunkist and 82½ per cent from Morgan Ward and the others?

A. Is that a question?

Q. Yes.

A. It is possible, but I wouldn't vouch for the correctness of these percentages.

Q. In the next following year, which was the

(Testimony of Nicholas J. Winckler.)

packing year 1950, which in your books ended with your fiscal year January, 1951, isn't it true that 98½ per cent of your tonnage of Valencias you bought from the Independents and only 1½ per cent from Sunkist?

A. It is possible.

Q. And isn't it true that in the next following year, the last year of your operation, you bought 98½ per cent from Morgan Ward and the others, and less than one-half of one per cent from Sunkist?

A. Well, you said 98½. You mean to say 99½?

Q. I did. You are right. 99½.

A. Well, that is possible, too. [1436]

Q. In 1949 Morgan Ward negotiated on behalf of the Independents a custom packing arrangement with you, did he not?

A. Probably toward the end of the season. If you qualify that question to the extent that a certain percentage or a small percentage of the tonnage was based on a custom packing arrangement, so that we shouldn't be under the impression that the whole tonnage was based on a custom packing arrangement.

Q. Do you remember the terms of that agreement, which I believe was entered into in August of 1949, related to the packing by you of single strength Valencia juice?

A. Well, I have a recollection that there was an agreement. I would like to see it if I have to answer questions pertaining to this agreement.

(Testimony of Nicholas J. Winckler.)

Q. In that year——

Mr. Dixon: Is this '49 or '51?

Mr. Strachan: '49. This is single strength juice; not frozen.

Q. (By Mr. Strachan): By that agreement you were to process at least 60 per cent of the Independents by-products oranges, were you not?

A. I would like to see the agreement before I testify to the agreement.

Mr. Dixon: Is it in writing, counsel? [1487]

Mr. Strachan: Yes.

Mr. Dixon: I, frankly, haven't seen it. That is the reason for the question.

Mr. Strachan: Are you sure you don't have this, Mr. Dixon?

Mr. Dixon: I have '51, but I don't have '49.

The Court: This has never been exhibited to counsel?

Mr. Strachan: It was obtained from them.

The Court: I understand all these records were obtained from them. You were given permission to obtain records; that doesn't mean that Mr. Dixon ever saw these documents.

Mr. Dixon: I have not seen it, your Honor, no.

The Court: Do you want to look it over?

Mr. Dixon: Yes, I would appreciate it.

The Court: Do you have an extra copy of this so that he could look it over tonight and you could go on with this cross-examination tomorrow?

Mr. Strachan: We have extra copies at the

(Testimony of Nicholas J. Winckler.)

hotel. I hadn't intended to put the agreement, as such in. I just wanted to get the essential terms of it.

Mr. Dixon: I think the agreement would speak for itself, and that is why I asked the question whether it was in writing or oral.

Mr. Strachan: I don't think the terms of the agreement [1488] are in issue here.

Mr. Dixon: Maybe not.

The Court: The witness has said, in answer to your question, that he would like to see the agreement. You may either exhibit it to him or abandon your line of questioning. Mr. Dixon is entitled to see it.

I am going to direct again, that the exhibits to be used be exhibited prior to the time that they are used in the courtroom, unless they are impeaching exhibits.

Mr. Strachan: I didn't think that it would go in as a document. I thought we would just go into it as the history between the Independents and this witness, because I don't think there is any issue about it.

Mr. Dixon: Counsel, I won't hold up your examination by taking the time to read it at this time.

Mr. Strachan: The witness just wanted to see it.

Mr. Dixon: I suppose it would speak for itself.

The Court: It will be marked as an exhibit for identification as Defendants' Exhibit X.

(Testimony of Nicholas J. Winckler.)

(The document referred to was marked Defendants' Exhibit X for identification.)

(Document handed to the witness.)

The Witness: Well, I would like to save the court's time. I glanced as quickly as possible through a six-page agreement. I couldn't read it, of course, carefully. [1489]

Q. (By Mr. Strachan): In substance, didn't that agreement provide that you would be furnished 60 per cent, at least, of the by-products oranges that the Independents had for processing?

A. Well, the way I see the agreement is that we secured about 60 per cent——

Mr. Dixon: Now, counsel, I would like to read the agreement. Does it so provide specifically?

Mr. Strachan: Yes. It says at least 60 per cent of the by-products oranges shall be furnished to him.

The Court: Would you call his attention to page and line, Mr. Strachan?

I thought maybe you had it before you there.

Mr. Strachan: No. That is the only copy I have.

Mr. Dixon: It so provides, counsel. So stipulated.

The Court: Does the record show you stipulate?

Mr. Dixon: Yes.

The Court: State to the jury what it provides so we will have no confusion.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: The agreement provides, as I understand it, that the Independent Fruit Growers Association will furnish to Winckler-Smith at least 60 per cent of its by-products oranges. Winckler & Smith agrees to pay for the fruit, after it is canned into single strength juice and it has been disposed of. Until disposed of the goods will be [1490] kept in a public warehouse. And the price was an escalated price based on the selling price for the canned product. That is, if the product sold at $4.25 for a case of 12/46 ounce cans, the oranges were to be paid for on a basis of $43 a ton. For every five cents that the price of the finished product increased above $4.25, the price of the raw fruit would be increased $1.00 a ton. For each five cents that the orange juice might fall below $4.25 per case, it would be $1.00 a ton deducted from the $43 price.

I believe that is the substance of the agreement.

Mr. Dixon: If the court please, I am going to object to any characterization by counsel of a document which is in writing, itself, and can be introduced in evidence. [1491]

The Court: Well, this is a shortcut, Mr. Dixon. You can look the transcript over in the morning and look at the document, and if that is a fair summary, we will save some time. If it is not a fair summary, either one of you can offer the document in evidence and read parts of it.

Mr. Dixon: Thank you, your Honor.

The Court: The objection is overruled.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): That agreement was entered into and you operated under it, did you not, Mr. Winckler?

A. Yes. Well, of course, there are many other provisions of this agreement which were not mentioned.

Q. And there was a final settlement of the rights of the parties under that agreement as of the end of 1949, sometime in December you had a final settlement under the agreement, is that correct?

A. Yes.

Q. Can you tell us how the base price of $43 a ton under that contract with the Independents compared with the price at which Sunkist was offering by-product fruit at the same time?

A. If my recollection is correct, I believe Sunkist price was $2 more, was $45 per ton. That is just recollection. But usually the Independents were a couple dollars under the Sunkist price for a very obvious reason. Their fruit did not contain the juice, did not contain the yield of Sunkist. [1492] They segregated the fruit in a more stingy way, let's put it that way, than Sunkist did, and they knew it and that is the reason they made an allowance of about $2 under the Sunkist price. Rather take $45 fruit of the Sunkist quality.

Q. At times were you not able to obtain fruit at more than $2 less than the Sunkist price by dealing with these Independents?

A. Well, the only time that I recall offhand would be the year 1951, and there I couldn't say

(Testimony of Nicholas J. Winckler.)

how much under the Sunkist price we obtained fruit, because we don't know what the Sunkist price really was. If we take the officially published price of $40 a ton based on 120 solids, our dealings with the Independent Fruit Growers during 1951, like on the school lunch program, called for a $35 price, and in that event, counsel, you are right. We obtained the fruit at $5 under the price.

But the $40 price to juice canners, as we know, was a theoretical price, let's put it that way.

Q. Do you remember having reported to your executive committee in June, 1949, that you had succeeded in securing a thousand tons of fruit from the Independent Growers at 10 per cent below the Sunkist price?

A. Well, if there is such a report to the executive committee, then that was probably true.

Q. Now I would like to go into another custom packing [1493] deal that you had with the Independents, which I believe was negotiated with Mr. Morgan Ward, between you and Morgan Ward. It has to do with the processing of frozen concentrate in the fall of 1951. Do you recall that you had that contract? A. Yes, I do.

Q. Will you just tell us briefly what that arrangement was, how much fruit you were to process and how the purchase and the payment was to be arranged?

Mr. Dixon: Was it a written or oral contract, counsel?

Mr. Strachan: Pardon?

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Was it written or oral?

Mr. Strachan: I don't recall at the moment. Do you happen to recall?

The Court: The question is to you, Mr. Winckler.

The Witness: I think it was in writing.

Mr. Strachan: Isn't that the contract you had, Mr. Dixon? You said you had one.

Mr. Dixon: Presumably you have a copy of whatever it was. I have seen one for 1951 with the Independent Fruit Growers. That is undoubtedly what you are referring to, counsel.

Q. (By Mr. Strachan): In any event, you did have this arrangement with Morgan Ward and the Independents whereby you were to pack frozen concentrate Valencia orange juice in the fall of [1494] 1951?

A. Yes. We packed some frozen Valencias, that is correct.

Q. Did you perform that contract?

A. The contract was not a processing contract. The contract, according to my best recollection, in essence was that we secured a little bit of fruit for approximately $35 per ton from the Independent Fruit Growers and we committed ourselves that that would go into frozen orange concentrate rather than single strength juice. There was no sacrifice to such commitment, because you couldn't use $35 fruit for single strength juice. I think that was the effect of the agreement.

An then the agreement probably provided the

(Testimony of Nicholas J. Winckler.)

fruit had to be paid, if I recall correctly, it had to be paid whenever we got paid for the merchandise sold, but in all these contracts with the Independents, regardless if it was single strength or frozen, we had to invest always our own money to pay for the cans and cartons and labor and overhead, and so on. Nobody paid us for it.

Q. But under this contract——

Mr. Dixon: Counsel, I have the contract here and suggest it be referred to since it is [1495] available.

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The Court: Mark it Exhibit Y for identification. It may be withdrawn by counsel if they want to see it tonight.

The Clerk: I have marked it Defendants' Exhibit Y for identification.

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Q. (By Mr. Strachan): You say that taking this fruit at a $35 price was not a sacrifice—no, you said committing yourself to making frozen rather than single strength juice was not a sacrifice?

A. Because you couldn't use $35 fruit to produce single strength orange juice.

Q. But you could use it for the frozen concentrate, [1496] is that correct?

A. Well, just probably trading dollars, not to make any profit on it, because our volume on frozen concentrate was a small fraction of our plant out-

(Testimony of Nicholas J. Winckler.)

put on single strength juice. It was one-eighth what we could have put out in single strength juice.

Q. Let me see if I follow you. It seems to me that you testified that for three shifts, 24-hour operation, that is, you had a capacity of 50 tons a day for frozen concentrate?

A. Yes, and on single strength juice we had 400 tons a day, so that is what I said. Eight times. So we couldn't make any money on that small tonnage that we run into frozen concentrate, but having been prevented of running in 1951 on regular Valencia single strength orange juice, we felt we are doing better by recovering a small percentage of our overhead than doing nothing. [1497]

Q. Speaking of your capacity, are you able to tell the court and jury what per cent, or what the maximum tonnage was that you ever processed in any month in the year ended with January, 1950, or the year ended January, '51?

A. Not going farther back, just '50 and '51?

Q. Yes. What was the highest daily average you ever reached in a month in those years?

Mr. Dixon: Are you speaking of single strength, counsel, or all juices?

Mr. Strachan: I am talking about total tonnage processed.

Mr. Dixon: I know. But there are several products involved.

The Court: You are talking about total tonnage of all fruit?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Yes.

The Witness: Per day or per month?

Q. (By Mr. Strachan): What was the highest average day in any month you ever worked? By that I mean, if you operated 25 days in August, what would be the average tonnage per day, do you know?

A. Well, I could answer the question this way: I know that in 1949 we were running certain days in excess of 300 or 350 tons per day; but how much that amounts as an average per month—— [1498]

Q. No. The average per day in the month.

A. That is what I want to say. The average per day I couldn't say, because that was governed solely on how much fruit you were able to obtain.

We had enough fruit some days to run up to 380 tons, maybe, one week.

Q. That was one day?

A. Or one week. And the next week we didn't get fruit but just to run 200 tons. So I don't know if you are driving at plant capacity or availability of fruit, or from which angle the question is asked.

I can say so much: that in 1949 we had days or weeks where we run at 90 per cent capacity, and there were weeks when we couldn't obtain enough fruit.

You see, every manufacturer is cutting down on overhead by running steady, evenly, and running all month the same quantity. It is better from the angle of help and cost reduction. But we didn't had the good fortune of having contracts like Tree-

(Testimony of Nicholas J. Winckler.)

Sweet had, when they could start out at the height of the Valencia season and know exactly how much fruit they are going to get in next week or next month or the next three months and plan the labor accordingly, and the storage and the supplies and the cans and the sales and everything. We had been not as fortunate. So our fluctuation varied very much. [1499]

Q. Now, getting back to this frozen concentrate, do you know how the price of your finished product or canned frozen concentrate compared with the price of the Sunkist frozen concentrate in the fall of 1951?

A. Yes, sir. I could approximately state.

Q. That is what I want.

A. The price difference between our concentrate and Sunkist frozen concentrate is probably the same as it would be today. There are two kinds of brands, nationally advertised brands and brands which are not nationally advertised.

At that time I recall the Sunkist concentrate sold probably at around $1.80 or $1.85, and ours sold probably around $1.45 or $1.50. Now, that is a close guess.

Q. Is that on single strength or frozen?

A. You asked me on frozen.

Q. Yes. A. Yes.

You have the Anagrams, and I think the price quotations are stated there.

Q. Now, can you tell us what the relationship

(Testimony of Nicholas J. Winckler.)

was between Sunkist single strength Valencia juice and your single strength juice?

A. Pricewise?

Q. Yes.

A. That varied greatly. There were times when Sunkist [1500] sold its single strength juice under the Exchange brand, as you recall, prior to 1951, Sunkist if you recall sold all their single strength juice as Exchange brand. The Sunkist label was really activated only in 1951. There were times when our juice sold for a higher price than Sunkist.

Q. What times were those?

A. Well, sir, I couldn't answer you that. There were price fluctuations weekly up and down. We are going back for seven years. I couldn't answer you that. But looking over the correspondence that you supplied I found a letter where the broker called our attention to it that Exchange is quoting less than we are asking for it. I think that was in '49. And there were times when the Exchange asked more for it and we were less.

The is natural. That is the way business is.

Q. Was there any relationship between your prices on single strength juice and Sunkist prices that you would regard as a normal relationship?

A. What do you mean by a relationship?

Q. I will put it this way: Was it ordinarily true or did you try to see to it that it was true that you got higher prices than Sunkist?

A. I was always trying to see to it that I could

(Testimony of Nicholas J. Winckler.)

sell the merchandise at a price which gives us a normal profit and at the same time a price which is fair to our customers, and [1501] of course such a price had to be, due to the law of supply and demand, in proportion to the price of competitors of ours, regardless if their name was Sunkist, Exchange, Silzle, or TreeSweet.

Q. Did you pursue a policy of pricing your products above Sunkist?

A. We did not pursue any other policy than what I just stated.

Q. Well, in pricing your products did you ordinarily find that your prices on single strength Valencia had to be the same, or above, or below Sunkist?

A. In the first place, when you mention Sunkist, are you restricting your question only to 1951 when Sunkist single strength Valencia orange juice was put out already under the Sunkist label, or are you including in your question the years 1949, '50, when the Sunkist juice was put out under the Exchange label?

Q. Well, I didn't think that 1951 was involved, because I seem to recall that your testimony was that you didn't sell juice that year.

Mr. Dixon: Counsel, he testified that he sold Florida juice under the Anagold name.

Mr. Strachan: I will accept that amendment.

Q. (By Mr. Strachan): Did you sell any Florida juice in California under the Anagold [1502] name?

(Testimony of Nicholas J. Winckler.)

A. Yes, sir, I testified to that before.

Q. When was that? A. In '50 and '51.

Q. What time in '51?

A. Do you mean when I sold Florida juice?

Q. In California.

A. I don't know exactly the time, but my recollection is that it was during the winter months of 1951, before the Valencia season started.

The Court: By that you mean the winter months at the beginning of '51?

The Witness: In the beginning of '51, January, February, March, '51.

The Court: Then if you are going to pursue the question, answer the witness' inquiry, by the word "Sunkist" you did refer to the Exchange label as well?

Mr. Strachan: Yes.

The Court: All right.

Now, what is the question?

The Witness: Is the question still the same, if we pursued a certain policy of being higher or lower than Sunkist?

Q. (By Mr. Strachan): During the years 1949 and 1950, referring only to California Valencia single strength juice, were your prices usually the same as, higher than, or lower [1503] than Sunkist prices?

A. I think the answer could be all three. Sometimes it was higher, sometimes it was the same, and sometimes it was lower. We would have to go into an extensive study of comparing sales bulletins of

(Testimony of Nicholas J. Winckler.)

both Sunkist—rather, Exchange Orange Products and ours, to ascertain when our prices were higher, when they were similar, or when they were lower.

I will say something to clarify that. It still wouldn't give the true picture, because I don't know, I cannot use a better term than that colloquial term, the food business is a big chiseling business, and that goes for seller and buyer alike. When a manufacturer puts out a bulletin, it does not mean that in certain territories he would not agree to certain special temporary allowances, such as an advertising allowance, or a stack allowance, or deals, one case free with ten. I mean there are all kinds of allowances when a manufacturer wants to push distribution in a territory, or is overpacked and wants to get rid of inventory.

And I was told that such allowances were given and granted by products packed under the Exchange label from time to time in various territories.

So you see, counsel, it would be almost impossible to come to a decision, without doing weeks of research work and going through the correspondence of the Sunkist people, as well as ours, to find in the files all the special letters [1504] or allowances which were given in certain territories to brokers to compare which was higher or which was lower.

I would say so much: I think Sunkist had the same honest desire as we did, to get for the merchandise as much as was obtainable, figuring competition and figuring all circumstances. [1505]

* * *

ERNEST A. BROWNE

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as [1512] follows:

* * *

Direct Examination

By Mr. Dixon:

Q. Mr. Browne, will you state your present residence address please?

A. 887 Crenshaw, Los Angeles.

Q. What is your present business or occupation, if any?

A. Nothing. I am retried.

Q. Directing your attention to the year 1950 will you state to the jury what business you were engaged in at that time?

A. Yes; I was manager of the Union Appraisal Company, and also president.

Q. Were you engaged in that type of business in the year '51, also? A. Yes.

Q. Will you state to the jury what the nature of your business is so that they can understand what you did?

A. Yes. We were in the general appraisal business. That is making appraisals of all types of property, land, buildings, machinery and equipment, and also the furnishings of hotels, clubs, and very fine residences. We also made appraisals of cities, counties, utilities, school properties, absolutely everything, every type of property.

Q. How long had you been engaged in that business, [1513] Mr. Browne?

(Testimony of Ernest A. Browne.)

A. We were established in 1926.

Q. And this company that you were connected with and the appraisal work that was being done by that company was known as the Union Appraisal Company, is that correct? A. Yes. [1514]

Q. Now, can you give the jury a little bit more information as to how these appraisals that your company conducted are made?

A. Well, you are referring—we had two or three departments—you are referring to the engineering department covering buildings and machinery and equipment, I presume?

Q. That is correct, Mr. Browne.

A. Well, of course, I made no appraisals myself.

Q. You were the president of the company?

A. Yes. I directed the appraisals.

Q. They were made under your supervision and direction?

A. Yes, but, of course, we had specialists in each department, men who were very competent in making appraisals of all types of structures, and men who were very competent in making appraisals of machinery and equipment.

Q. Did you have during the year 1951, a Mr. Roehr, R-o-e-h-r, and a Mr. Hampsted, H-a-m-p-s-t-e-d, on your staff or on the staff of the Union Appraisal Company?

A. Oh yes. They had been with us for a number of years prior to that time.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: It is coupled with the year, counsel?

Mr. Strachan: In 1949.

Mr. Dixon: Thank you.

The Witness: According to my recollection, in very exceptional instances, maybe two or three.

Q. (By Mr. Strachan): Did any of the brokers state in that connection that their customers would be nervous about financial conditions unless they could be assured of your financial stability?

Mr. Dixon: I object to that question, your Honor, the form of it. It is dealing, I presume, with oral conversations.

The Court: Objection is overruled. It is a general question. "State" could mean orally or by writing.

You may answer.

Do you want it read?

The Witness: Please.

(Question read by the reporter.)

The Witness: I don't remember. It could be.

Q. (By Mr. Strachan): I show you Exhibit AK and ask you if that refreshes your [1590] recollection?

A. Will you show me where the broker is nervous, please?

Q. I will show you AL and ask you if that refreshes your recollection in that respect?

A. Yes, that does refresh my recollection.

Q. All right. Now, what is your answer to the question whether they stated that the customers

(Testimony of Nicholas J. Winckler.)

would be nervous unless they could be assured of your financial stability?

A. Well, my answer to it is, if I am not confused with all these papers here, that the same broker sold merchandise two or three months later. That letter is dated in June, and then we had some deals or correspondence, at least, at a later date during 1949——

The Court: The question is, still, "Did some broker so advise you that his customer might be nervous about your financial condition?" That is the question.

The Witness: Your Honor, I believe I answered that.

The Court: No, you didn't.

The Witness: Yes.

Q. (By Mr. Strachan): Did some of the brokers after the reorganization advise you that before they could continue it would be necessary to have a statement of the financial condition of the company, because they did not intend to be involved in another deal similar to the one in which California merchandise was shipped into Chicago and spoiled and they [1591] had no recourse?

A. One broker. Not some.

Q. Was that Irwin Tucker of Chicago?

A. It was.

Q. And is the letter AK the letter that you refer to? A. Yes.

Mr. Strachan: On that basis, your Honor, I offer the statements of the witness and the letters in evi-

(Testimony of Nicholas J. Winckler.)

dence, not for impeachment, but for the purpose of showing the attitude of the brokers and the causation.

The Court: Let's just offer AL and AK, and not the evidence. We can take that up later.

Mr. Strachan: All right. I will offer the documents.

The Court: But not for impeachment?

Mr. Strachan: Not for impeachment.

The Court: Your general objection?

Mr. Dixon: The general objection, your Honor.

The Court: They are cumulative, are they not, counsel?

Mr. Strachan: Of his testimony.

The Court: They are cumulative, aren't they?

Mr. Strachan: Of the testimony just given, yes.

The Court: The objection is sustained to AL and AK.

That leaves us with AN. Do you offer AN?

Mr. Strachan: I offer AN.

The Court: For what purpose? [1592]

Mr. Dixon: If the court please, with reference to AK and AL, in line with my previous comments, may it be stipulated for the record that these are the only two exhibits referred to by counsel from the files of the plaintiff corporation, and that the replies thereto, dated May 26, 1949, to Exhibit AK and reply thereto of June 6, 1949, are offered to complete those exhibits. [1593]

The Court: Well, you have got too many things

(Testimony of Nicholas J. Winckler.)

in here. We have attached to AK the reply you refer to of May 26.

Mr. Dixon: Then I withdraw comment on that.

The Court: As to AL, we do not. Hand your letter up and we will mark it AL-1 for identification. Do you have the reply there?

Mr. Dixon: Yes, it is there.

The Court: Let me see it. AL-1 dated June 6, 1949, from Winckler-Smith to Dick Young Brokerage Company is marked for identification.

Is it stipulated it came from the records of the plaintiff company and was a reply to AL for identification, Mr. Strachan?

Mr. Strachan: I beg your pardon?

The Court: It is marked AL-1 for identification. Can it be stipulated it came from the files of the plaintiff company and was a reply to AL for identification?

Mr. Strachan: Yes, sir.

The Court: All right. It is not offered. It is merely marked AL-1. [1594]

* * *

The Court: The last stipulation he asked you for was whether or not these two letters were the only two that were submitted to the plaintiff following the search by the defendants. [1597]

Mr. Dixon: That's all I am asking, your Honor.

Mr. Strachan: Yes, I will stipulate that.

The Court: Let's get gack to AN for identification. [1598]

* * *

(Testimony of Nicholas J. Winckler.)

The Court: Or misfiling, yes. All right. Let's take up AN. What is the purpose of AN?

Mr. Strachan: That bears on the question of whether [1601] there was lack of proof of inability to sell which resulted in the failure——

The Court: Offered as admission against interest?

Mr. Strachan: Yes, sir.

The Court: What is the objection, Mr. Dixon?

Mr. Dixon: Just a moment, your Honor.

The Court: You are referring particularly to paragraph 2, I take it.

Mr. Strachan: Paragraph 2 and the next following paragraph.

Mr. Dixon: I don't see any reason, your Honor, for putting this letter in. The witness is here. If counsel wants to inquire into the substance of this letter, it seems to me that would be the best evidence. The letter is purported to have been written September 19, 1951. I object to it on the ground it is not the best evidence. If he is offering it for the truth of the contents stated therein, the witness is here to testify concerning anything that may be contained in the letter, and it seems to me that is the best evidence. I therefore object to it on that ground. It is not the best evidence of what it purports to deal with.

The Court: It is offered as an admission against interest, not a letter by this plaintiff, but a letter by the company. I take it it is conceded this came from the files of the plaintiff company. [1602]

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Yes.

The Court: And O'Hanlon was the assistant sales manager.

Mr. Dixon: Yes.

The Court: Objection overruled. Received in evidence. [1603]

* * *

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, when did the frozen concentrate packing begin to be an important part of the processing of single-strength Valencia juice in California?

A. Well, counsel, that is a question that I won't be able to answer. According to some people it never became important and never will be. According to some other viewpoints it started to become important in 1951.

The Court: I didn't jump because of what the witness said. I looked over and saw a juror missing, but the juror's head was clear down below the rail of the box, and by the time [1605] I got through being startled the juror was back in place.

Go ahead.

Q. (By Mr. Strachen): Now, in 1949 isn't it true that the amount of single-strength juice packed as single strength, and the amount going into frozen concentrate, were about equal, that is about 50 per cent went into single strength and 50 per cent into concentrate?

(Testimony of Nicholas J. Winckler.)

A. Well, I don't have the statistical figures in my head.

Q. Do you know whether that is approximately correct?

A. I have the statistical information here, if I have a moment to look it up, if it is of any importance.

I assume that is correct if counsel has some statistical information.

Q. You don't know anything except that it is correct? Subject to you correcting me if you find it is incorrect, will you?

A. It would take too much time to look it up, so I have to rely on your statement, counsel.

Q. Between 1949 and 1950 the percentage going into frozen as compared to single-strength juice increased, did it not?

Mr. Dixon: Counsel, may I inquire, are you questioning the whole market, or are you dealing only with that produced in California? [1606]

Mr. Strachan: I am talking about the California market.

Mr. Dixon: All right.

The Witness: According to my best recollection the amount going into frozen concentrate in California increased to the year 1951.

Please, you understand, I am talking by memory. I am not looking at any statistics.

But after 1951 the volume going into frozen concentrate declined.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Strachan): Between what years?

A. Following the 1951 year. My understanding is that it has declined. And it is according to my best recollection.

Q. Assuming that in 1949 that going into single strength and that going into frozen concentrate was about equal, isn't it a fact that in the year 1950 there was a substantial increase in the percentage that went in frozen as compared with that which went into single-strength juice?

A. If we are talking generally about the industry, the answer is probably yes. On the other hand, if we are talking about individual plants——

The Court: We are talking about the industry in California.

Q. (By Mr. Strachan): The California pack as a whole. And isn't it true——

The Court: Let him finish the answer now that he knows [1607] what we are talking about.

Mr. Strachan: I am sorry.

The Witness: I think, your Honor, I should disqualify myself as a witness to testify to that, because I am not a statistician.

The Court: If you don't know, say so.

The Witness: I don't know.

Q. (By Mr. Strachan): Don't you know, as a matter of fact, that in 1950 pack year the single-strength juice going into frozen concentrate was approximately fourteen million gallons as compared with approximately six and a half million gallons sold as single strength, that is, nearly 65 per cent

(Testimony of Nicholas J. Winekler.)

of the total single strength in that year went into frozen concentrate, isn't that a fact?

Mr. Dixon: Just a moment.

The Witness: I cannot testify that it is a fact or not. I don't know.

Q. (By Mr. Strachan): Well, don't you know, as a matter of fact, that between 1950 and the year 1951 there was a still further increase in the percentage of single-strength juice packed as concentrate, as compared with that packed as single-strength juice?

A. I repeat that according to my best recollection the volume going into frozen concentrate increased up to and including 1951, and thereafter it declined. [1608]

Q. Isn't it true that in 1951 the single-strength juice which was frozen in concentrated form represented about sixteen and three-quarters million gallons as compared with a little less than five and a half million gallons packed as single strength?

Mr. Dixon: Just a moment, counsel.

May I inquire where you are getting these figures from?

You are way off if you are getting the figures from the same place that I am looking at.

Mr. Strachan: They are taken from the United States Department of Agriculture Statistics on the subject.

Mr. Dixon: That is what I thought you were dealing with.

The Court: Can't you gentlemen agree to some

(Testimony of Nicholas J. Winckler.)

stipulation? The witness says he doesn't know. Can't you agree on some stipulation as to what the report shows?

Mr. Stratchan: I should think we could. Facts are facts.

Mr. Dixon: Yes, we will be very glad to stipulate whatever the Government figures are as reported by the various processors.

The Court: Discuss it after Court.

Q. (By Mr. Strachan): Assuming that to be a fact, it would be true, would it not, that in the packing year of 1951, 80 per cent of the single-strength juice was packed in frozen concentrate form and only 20 per cent as single strength [1609] juice?

Mr. Dixon: Counsel, I must say that I think the best evidence on this are the figures, your Honor.

The Court: He has a right to ask this witness. Do you know, Mr. Witness?

The Witness: I don't know, your Honor, but I doubt that these figures are correct.

Q. (By Mr. Strachan): Have you ever made such an analysis yourself?

A. Yes. I would like to explain. We compared statistics a few weeks ago at Mr. Dixon's office, and we have here what is called Supplement, published by Sunkist Growers, and then we have one which is published by the U. S. Department of Agriculture. There is a wide variation of figures between the two publications. Also, we took one, I don't remem-

(Testimony of Nicholas J. Winckler.)

ber which one, which shows the total pack in gallons, and for the same year it shows the total pack in 24 No. 2 cases, I am talking about single strength, and there is a discrepancy between the gallonage statistics and the statistics by cases.

Q. Would you mind reading the title of the document that you are holding in your hand?

A. "1952 Supplement Statistical Information on the Citrus Fruit Industry Oranges, Lemons and Grapefruit." Below, it says: "Sunkist Growers Marketing Research Department, May, 1952."

Q. Thank you. [1610]

The first substantial quantity of frozen concentrate that was produced at the Winckler-Smith plant was in the fall of 1951, was it not?

A. That is correct. [1611]

Q. And that was packed under an arrangement with Morgan Ward? A. No, it was not.

Q. Well, how was it packed?

A. The fruit was obtained under an arrangement with Morgan Ward who is representing the Independent Fruit Growers.

Q. Do you recall what quantity of frozen concentrate you produced under that arrangement?

A. I won't recall it, but I know it was a very small quantity.

Q. About 1700 tons?

A. That could be correct.

Mr. Strachan: I will ask that this document be marked Defendants' Exhibit AO for identification.

The Court: AO marked.

(Testimony of Nicholas J. Winckler.)

The Clerk: AO for identification.

(The document referred to was marked defendants' Exhibit AO for identification.)

Q. (By Mr. Strachan): Mr. Winckler, I show you the document that has been marked AO for identification, which is dated January 24, 1952, and is addressed to Morgan U. Ward and is signed Winckler & Smith Citrus Products Company by J. F. Mesnard, secretary, and ask you if you recognize the signature of Mr. Mesnard.

A. Yes, I do. [1612]

Q. That appears to be a letter in which Winckler-Smith rendered an accounting under the arrangement for the packing of the frozen concentrate for the Independent Citrus Growers and Shippers Association, is that correct?

A. That is correct.

The Court: Do you offer it, counsel?

Mr. Strachan: Let's see if there is anything else I want to ask about in particular.

Q. Now, that accounting, among other things, shows items called "Additional Profit" and shows profit at 5 per cent, $6,887.44. A. Yes.

Q. And profit previously collected at the same amount? Do you see those items?

A. I see these items, and if you desire, I like to explain.

Mr. Strachan: Well, now, just a moment. I will offer the exhibit in evidence.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: I have no objection.

The Court: Exhibit AO received in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit AO.)

Q. (By Mr. Strachan): Now, Mr. Winckler, I would like to go into the subject of market conditions in the citrus packing industry following your resuming business in the [1613] spring of 1949 after your reorganization proceedings. The year 1949, so far as California processors were concerned, was an abnormally good year, was it not?

A. I wouldn't say so, it was abnormally good.

Q. It was not a normal year, was it, with regard to the competitive position of the California processors?

A. Well, counsel, the only way I could answer that question, if I have to make again a speech as an explanation, because you are trying to get yes and no answers from me on subjects where I cannot give you a yes or no answer.

The Court: Then give us your answer.

The Witness: In any year, and I think I testified to that before, if a year is a good year or a bad year from the angle of the California processor depends on the following circumstances.

First, that there should be fruit available. So except for some years when there was a fruit damage, frost, or anything like that, most years fruit is available.

(Testimony of Nicholas J. Winckler.)

The second thing is that the Florida market shouldn't be overloaded.

And the third and the most important factor is what price Sunkist is setting to processors on fruit prices. Now, when the price is set that way, there is a normal profit margin of 10 per cent allowed to the processor, and we have a good year. [1614]

In 1945 when we started out in business, there was a price set on oranges by the OPA and there was a price set on juice, also by the OPA, and at that time the price by the OPA on both the finished product and the juice was that way that it should allow to the processor for profit and depreciation and so forth, a reasonable amount, so the first year that we were in business, despite that I lacked American business experience. we made $95,000 the first six months.

In 1946 the fruit price at the beginning of the year was in proportion to what you could get for the merchandise, so it was a good year.

The second half of 1946, the price broke and everybody lost money.

In 1947, if my recollection is correct, the fruit price was set too high that we could sell in sufficient volume and make sufficient money. When I mean we, I mean Winckler & Smith.

Other processors, TreeSweet, as Mr. McCracken testified, had a processing contract from 1947 on each and every year for the last nine years, where they could make a substantial amount of merchandise without entering in any risk.

(Testimony of Nicholas J. Winckler.)

So if you ask, counsel, if it was a question whether it was a good year or bad year for Tree-Sweet it was always a good year because they had no risk. On the market they had no risk, how much they had to pay for fruit. They [1615] got it on consignment.

As far as Winckler & Smith is concerned, the situation is different. If the fruit price was set in proportion so we could obtain for the finished merchandise, we had a good year. I think I will stop here.

Q. Getting back to 1949, wasn't that year an abnormally good year for you to enter the competitive market against Florida?

A. Against Florida the market was better in 1949 than in other years. However, with the amount of fruit that we were able to obtain, we could have sold our products without ever going east of the Rocky Mountains. So the only reason that we were looking towards Florida, we could have made more money and we could have sold at less overhead and less sales expense if we could have concentrated our sales, say only for the West Coast. We could have sold in 1949 everything on the West Coast.

But we always try to maintain national distribution for the days to come when such a distribution is going to be valuable in any manufacturer's future business.

Q. Isn't it true in 1949, because of the abnormal conditions, you entered markets that were not normally open to you?

(Testimony of Nicholas J. Winckler.)

A. That is correct as far as the southern states are concerned, and I think our records will show that we sold very [1616] little in the southern states. We just wanted to put our foot in the door.

Mr. Strachan: I will ask that these two letters dated July 29, 1949, be marked for identification.

Mr. Dixon: What are these, counsel?

The Clerk: I have marked them AP.

(The documents referred to were marked Defendant's Exhibit AP for identification.)

The Court: Exhibit AP marked.

The Clerk: One is dated June, counsel, and the other is July. [1617]

* * *

Q. (By Mr. Strachan): I show you these letters and ask you if the first page is a copy of a letter written by you to Mr. Paul Pankey of Birmingham, Alabama? A. Yes, I recognize it.

The Court: You say "written by you"; they are written [1619] by the company, are they not?

Mr. Strachan: Yes, by Mr. Winckler for the company.

The Witness: It is over my signature, your Honor.

The Court: May it be stipulated that these came from the company's records and are records of the plaintiff corporation?

Mr. Dixon: So stipulated, your Honor.

The Court: All right.

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: I will offer them in evidence.

Mr. Dixon: I object to them on the ground they are wholly irrelevant and immaterial and do not tend to prove or disprove any of the issues in this lawsuit.

The Court: What do you offer them for? For what purpose, counsel—impeachment?

Mr. Strachan: No. I offer them as admissions of the market condition.

The Court: I read them. I didn't read them in detail, but they sounded to me generally like he testified to. Is it some cumulative matter?

Mr. Strachan: It is an admission, and I think it goes somewhat farther than he testified to.

The Court: That would be a question of fact for the jury. The objection is overruled. Received in evidence as Exhibit AP.

(Defendants' Exhibit AP was received in evidence.)

Mr. Strachan: I am reading from the letter dated June [1620] 29, 1949, addressed to Mr. Paul Pankey at Birmingham, Alabama and signed N. J. Winckler:

"We are familiar with the normal conditions existing in your territory due to the lower rates from Florida, but you will agree that this year conditions are not normal because Florida is practically sold out and also our prices are competitive with Florida's this year."

(Testimony of Nicholas J. Winckler.)

The second letter, July 29, 1949, addressed to Mr. George F. Seewagen:

"We know that under normal conditions California juice is a poor seller throughout your entire territory."

I might say that is Anniston, Alabama.

"However, this year is far from being normal in the citrus picture. Florida's price is very high and their supply has been entirely depleted. * * *

"We have many jobbers located in what is normally Florida territory, who are obtaining and sending us a considerable number of orders right now for Anagold."

Q. (By Mr. Strachan): The condition obtained into the spring of 1950 whereby you were able to sell juice at higher than normal prices, and in territories ordinarily [1621] not reached by California juice, because of the Florida situation, is that not true?

A. Well, the early part of 1950 was still under the same influence, as I testified before, as in 1949, because the Florida pack didn't got under way yet in sufficient quantity to replenish the juice. I think I testified to that extent before.

Q. Do you recall approximately——

The Court: Now, wait.

Finish your answer. That is the early part of '50. The question was about the year of '50. Was there some difference later in the year?

The Witness: I thought that counsel asked only

(Testimony of Nicholas J. Winckler.)

about the early part of '50. Do you want me to carry on with the latter part of '50?

Mr. Stratchan: I would be very glad to have you tell the tendency of the Florida prices against which you were competing during the rest of the year 1950.

The Witness: After the Florida pack got under way and better quality juice was produced in Florida, say after January 1, 1950, the movement of the juice market was rather hectic. In 1950, as well as in 1951, the prices jumped around in Florida up and down many times during the year, and I won't be able to give you, counsel, or the jury, the exact months when it increased and when it decreased, but [1622] this time of the year, and Florida is famous for that, they just changed the price overnight, so that people hardly could catch up.

Q. (By Mr. Strachan): Isn't it true that in general the Florida prices, and I am talking here about unsweetened juice, hit a high in the fall of 1949, along in September or October, of over $4.50 a case, then in 1950 prices started down, so that by June of 1950 the prices were less than $3.50, by September and October and November it had gone down to about $2.39 a case, in the fall of '50—is that correct?

A. Well, yes and no. You see, the $2.35 price doesn't apply to identical merchandise, which was priced at $3.50 or even at $4. The Florida packing season starts in fall, and whenever the Florida packing season starts, the opening prices are

(Testimony of Nicholas J. Winckler.)

usually very low because the first two months the quality of the juice packed in Florida is poor, and it is known to the trade. Certain people want cheap juice and would rather go for price than for quality.

Now, as the maturity of the juice increases in December, January, and February, the price in Florida goes always up and reaches its peak usually at the peak of the season, of the orange harvesting season.

The Court: When is that, the peak?

The Witness: The peak is, I would say, February, March. And then gradually it goes down. So the $2.35 price is not [1623] paid for the identical merchandise which was sold six months before for $3.50.

The Court: That change that takes place, is that because the fruit in Florida matures and gets sweeter?

The Witness: That is correct, your Honor.

The Court: The same situation that occurs here with the California Valencia?

The Witness: With the California Valencia, yes, your Honor.

Q. (By Mr. Strachan): Now, the change in the market was such that by November of 1950 you were advising your broker Bagley here in Los Angeles that conditions were becoming so competitive that California canners have to rely more and more on West Coast business, and business in the Middle West or East, isn't that true?

(Testimony of Nicholas J. Winckler.)

A. That is true, but let me put it this way: If you are quoting from letters written to brokers, there is of course a lot of sales talk. When the May Company advertises unbelievable values in ladies' skirts, that doesn't mean that no other department store ever sold ladies' skirts as cheap as the May Company did.

That is sales talk. That is a sales speech. And every sales manager, of course, tries to influence the brokers that they should buy merchandise for some reason.

The Clerk: I have marked Defendants' [1624] AQ.

(The exhibit referred to was marked Defendants' Exhibit AQ for identification.)

Mr. Strachan: It is stipulated, I take it, that this came from the files of the plaintiff?

Mr. Dixon: Yes, your Honor.

Mr. Strachan: I will offer it in evidence. [1625]

Mr. Dixon: Just a moment. I object on the same grounds as before. I don't think this document in any way tends to throw any light on any of the issues in this case, to either prove or disprove any of them, irrelevant, immaterial to any of the issues in this lawsuit. Objection is made on that ground. Not the best evidence. I don't know for what purpose it is offered.

The Court: That is a question of fact for the jury.

Mr. Dixon: For what purpose is it offered, counsel, may I inquire?

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: It is offered to show in the fall of 1950 the market available to the plaintiff was cracking.

Mr. Dixon: It certainly doesn't show that in my judgment.

The Court: Objection overruled. AQ received in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit AQ.)

Q. (By Mr. Strachan): Mr. Winckler, in the late spring of 1951 you closed down your Florida office that you had established some time previously?

A. I just wanted to come to that, counsel. You didn't mention that we opened it up. I think the jury would be entitled to know about it, that we opened up an office in the fall of 1950, and that is the reason we wanted to sell our [1626] California juice on the West Coast, because there is a very strong connection between the fact, so let's talk about the opening of the Florida office before we close it.

Q. You had a Florida office in the fall of 1949—the fall of 1950 and the spring of 1951?

The Court: You said 1949. Did you mean that?

Mr. Strachan: No, 1950.

Q. When did you open your Florida office?

A. We opened our Florida office, I believe it was September or October, 1950. I think it was in Sep-

(Testimony of Nicholas J. Winckler.)

tember, 1950, and the purpose of opening that office was that we could supply with Florida juice the southern market mainly where I used the expression that we sold in 1949 to put our foot in the door,

In other words, we tried to do the same thing that our competitor TreeSweet did. They moved down to Florida and leased a plant and we wanted to be able to supply merchandise all year round and supply merchandise to people who are close to Florida so that we can compete with TreeSweet, so we opened up an office and merchandise was packed for us under the Anagold label and under other labels.

The Court: This was Florida juice?

The Witness: Florida juice.

The Court: That you sold out of your Florida office?

The Witness: That is correct.

The Court: All right. [1627]

The Witness: I think I testified—I showed the labels with the shield. We had separate labels printed to comply with Florida regulation.

Q. (By Mr. Strachan): That put you in competition, did it, with TreeSweet?

A. It put us in competition in addition to California juice, also with Florida juice.

Q. In further competition with TreeSweet?

A. Further competition.

Q. When did you withdraw from that further competition, from the Florida plant?

(Testimony of Nicholas J. Winckler.)

A. We withdrew from the Florida operation, I believe, in July, 1951.

Q. You closed that office, did you not?

A. Yes, we did, in July, 1951.

Q. That was because of chaotic conditions of the Florida market?

A. Well, probably I wrote that in one letter. The real reason it was just like speculating on the stock exchange. It was a very hazardous business. There was no logic in it and it was a wild speculation. If we would have kept our juice we would have made a lot of money, but we sold always when—I mean we bought as much juice, as much as we sold, so we never carried a substantial inventory, and we made a very small brokerage only, a very small mark-up. I [1628] think two or three per cent.

Q. So you closed that office? A. Yes.

Mr. Strachan: I ask that this document be marked.

The Clerk: Defendants' Exhibit AR for identification.

(The document referred to was marked Defendants' Exhibit AR for identification.)

Mr. Strachan: Under the stipulation, I offer the exhibit in evidence, your Honor. [1629]

• • •

Mr. Dixon: I have it. It is marked what?

The Clerk: Exhibit AR.

The Court: It has been offered. Any objection?

Mr. Dixon: The same objection, your Honor, as before.

The Court: Overruled. Received in evidence, Exhibit AR. [1630]

* * *

The Court: One other thing. These letters were generally offered for impeachment purposes, and I think I should tell the jury for what purpose they can be used and for what purpose they cannot be used.

Mr. Strachan: There were some that were introduced on the theory of admissions against interest, your Honor. [1646]

The Court: There has to be a segregation. On letters which were written by the company, I think they are in for all purposes. On letters which were written by brokers to the plaintiff, those letters are offered——

Mr. Strachan: They are being received.

The Court: Rather, they are being received under what I called the most common theory yesterday, namely, whether or not the declaration of the third party brought a notice or something to the mind of the person receiving the letter. Namely, the impeachment idea is this: Winckler has said he had no complaints. These were letters of complaints. Now, they are not offered for the truth of the fact that complaints were made, they are offered on the issue whether Winckler had notices of complaints, good or bad. Is that right? That is, that is why they are received?

Mr. Strachan: As I understand it on your

Honor's rulings that is a correct statement of the limited purpose for which they are received.

The Court: I think, maybe, rather than discuss it at great length I ought to give them an absurd example, an example out of all reason. For instance, supposing a man said, "I never had any knowledge that anybody had accused me of killing my mother-in-law," and then a letter was produced where somebody writes and tells the man, "You on such-and-such a date killed your mother-in-law." Now, the evidence is [1647] received for the basis of testing the witness' statement as to what knowledge he had; it is not evidence that at any time he ever killed his mother-in-law.

Is that sufficiently absurd and far enough away from the case to illustrate it?

Mr. Strachan: I don't know what effect that would have on the interpretation of my evidence, your Honor, and I don't want——

The Court: Would that hurt your position?

Mr. Strachan: I think it might.

The Court: What I am trying to do is keep away from——

Mr. Strachan It seems to me that the way you put it before was not an abstruse or technical explanation of the theory on which they are being received, and your instruction to the jury in about the language you used today would be unobjectionable, but I am not sure, if you go on and amplify that by these absurd examples, that it might not have some influence.

The Court: We will leave the mother-in-law out, then.

Mr. Strachan: I think I would prefer that.

The Court: Then I think I will probably do much as I did before.

When any witness takes the witness stand his credibility is put in issue; that the jurors are the sole judges of the credibility of witnesses, and what weight they give to his [1648] testimony; and a general instruction as to their function on this matter. That when evidence is admitted it doesn't mean that the court has one view or another of it, but it is for their consideration on the facts, and that these letters bear upon this problem: That the defendants contend that Winckler claimed that he had no complaints about his products except navel juice, and the defendants contend to the contrary, that he had had notice of complaints of other products; that tnese letters are then being admitted solely on the question of impeachment as to what notice Winckler had, and therefore on the issue of his credibility as a witness. The jury are the sole judges of his credibility. That the letters are not being admitted for the truth or lack of truth of any statement contained therein.

I would like to give some example to point that up, because it is a little hard—it is hard enough for us lawyers to understand, we didn't agree on our legal argument, and now we are going to have jurors decide it.

Mr. Strachan: Up to this point, your Honor, I think your expression of the ruling is acceptable,

but I think beyond that there might be some risk involved. [1649]

The Court: Well, could I take out one particular letter, for instance, to illustrate the point? There is one letter, we will say, which says, for instance, something about—well, I guess that one didn't go into evidence. I was thinking of the one about swollen cans. Let's see the letters.

Mr. Dixon: The first one on top, your Honor, Z.

The Court: Let's see it. Also, on some of these letters, of course, it is still a question for the jury as to what juice was involved. We are not going to comment extensively on that.

I might just take the first paragraph of that Z letter, take that one statement, "None of the brokers liked the quality of this juice for it had an aftertaste that was objectionable," point out that this letter is not being admitted for any proof of that fact, but merely for proof of what the broker wrote to Winckler.

Mr. Strachan: Would you take the whole paragraph?

The Court: I will read the whole first paragraph, say, take one example to try to point out what this ruling means. Is that all right?

Mr. Strachan: Well, would your Honor mind reading the first and the third paragraphs?

The Court: I am not going to read the third, because that is just the type of thing why I excluded these on your general objection, that you offered them for the state of [1650] mind of a broker, but you are trying to get a specific state of

mind, in this particular case, a broker giving advice as to what Winckler would have to do.

Mr. Strachan: In order to get acceptance of his juice on the market.

The Court: And that is certainly the type of thing that would require cross-examination. I want to pick out an example of some statement of fact that is put in the letter, and here they have got taste is objectionable.

I proposed a very violent example. You didn't like that. This example is a mild example. Now we have got both extremes and you apparently don't like either suggestion.

Mr. Strachan: I don't like to have the letters fragmented. I will try to find one.

The Court: Well, I think that will do it, Mr. Strachan. You are fragmenting the letter when you read them. You are reading excerpts.

Mr. Strachan: Right. [1651]

* * *

(The following proceedings were had in the hearing and presence of the jury.)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, as the case has progressed, from time to time I have attempted to assist you in indicating for what purpose evidence was offered, where the court admitted it for one purpose and where it was not to be considered for other purposes. We are at one of those places today. I am going to take a few minutes to try to

explain to you, if I can, in simple language, what we are talking about.

Generally speaking, if evidence is admissible on any ground, it goes into evidence. It goes into the record or becomes an exhibit, but that doesn't mean you can always consider that evidence for every purpose that you want to consider it for. You have to, therefore, follow the court's instructions as to what purpose evidence is admitted for.

Now, we come today to evidence which has been received generally, evidence offered by the defendants which has been received generally on the question of impeachment.

Impeachment is the attack that is made on the credibility of a witness, how much weight should you give to a witness' testimony. You are going to be instructed in detail about that. In fact, I am going to read you one of the form instructions [1653] this morning on that, because the credibility of every witness that appears before you is for you to decide.

It is just like in your affairs in life when you take care of your own concerns, and you are conducting some business venture, you may believe 90 per cent of what a man tells you, you may believe 100 per cent, you may believe one per cent, or you may believe nothing that he tells you. It is common experience that we use our own heads and sort out, as it were, the credibility of the people we deal with.

Now, you have the same task as jurors to judge

the credibility of each witness. Evidence which tends to detract from credibility, if you so find, is what we speak of as impeachment testimony.

A very common example of impeachment testimony is that Joe Doakes said, "I never met Bill Smith in my life." Then they bring Bill Smith on the witness stand and he says, "Yes, I met him on such and such a date."

Well, there may be further testimony later to explain, but head-on, they come on to some question of fact.

The general instruction that the court gives on this matter of credibility is about two paragraphs, but you have to listen to it carefully.

"You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to [1654] speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more witnesses witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy [1655] results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it [1655-A] deserves."

Now, there have been admitted in evidence the following exhibits while you were not present: Exhibit 52, a plaintiff's exhibit; Exhibit Z, Exhibits AA, AF, AG, AH, AI, AJ, AM and AN.

With reference to these lettered exhibits, they fall into two classes. One class are letters which brokers wrote to Winckler & Smith. The other class are letters which Winckler & Smith company, through the sales manager, or I don't know whether there are any of them personally signed by Mr. Winckler, but they are company letters, and you can see from the letter generally who signed it in behalf of the company and, of course, whoever signed it acted for the company.

Now, in some instances in these exhibits you will find both letters in one exhibit. I think there are

one or two instances of that, are there not, where one exhibit has a letter from the broker and maybe attached is a reply from Winckler & Smith?

Mr. Strachan: That is true.

The Court: So I am not going to sort them out by numbers for you, but I will tell you there are two kinds of situations: one, letters Winckler & Smith wrote, and the other letters that brokers wrote to Winckler & Smith, and there is a difference in their application.

The letters that were written by the company may be [1656] considered by you for any purpose, just like you in your business affairs are bound by letters that you write. They can be used against you, and so letters written by Winckler & Smith may be used against Winckler & Smith.

In the case of the letters written by the brokers to Winckler & Smith, they can be admitted for a limited purpose. That purpose is this: Mr. Winckler on cross-examination was asked whether or not—I am not going to read his testimony, you will have to recall it, that is your job, but he was asked whether or not there had been complaints by brokers about his products, and merely to refresh your recollection generally, he said that there had been numerous complaints about navel juice because of the fact that it was more bitter than Valencia, and he disclaimed rather generally that there had been complaints that he recalled about other products. He also talked about brokers phoning who had a complaint, picking up the phone. He talked also about where ultimate consumers had complained

how cans of juice had been sent to customers. That is not particularly involved here, but I am just trying to generally refresh your recollection on his testimony.

Now, we have these letters written by brokers to Mr. Winckler. They are offered by the defendants for the purpose of showing that Winckler did have other complaints other than the ones he admitted about the navel juice. [1657]

The fact that the court admits them doesn't mean that I put little weight or lots of weight on them, or that I have any view about them. The mere point is that they are properly in evidence for a limited purpose, and you may therefore consider them. And that limited purpose is to determine whether or not there was notice brought home to Winckler & Smith, and what the notice was. That is, was notice brought home to him of complaints?

They are not admitted for the truthfulness of what they contend. For example, supposing a broker had written a letter that he had a long series of complaints, that he made, about some canned goods, this one, two, three, four, five, six, seven, eight—the letter is not admitted as having any bearing for you to consider on whether those complaints were true or not, it is merely admitted to show that there were letters written to Winckler & Smith about complaints.

To demonstrate what I mean, supposing the broker had for some reason—this is absurd, but I will give it to you—supposing the broker had deliberately lied in a letter, nevertheless he wrote the

letter to Winckler & Smith and therefore it is admissible on the question whether there had been complaints made to Winckler & Smith, but it is not admissible for the truth of what is contained in the letter. Because whether he lied or told the truth, there was the letter that was received by Winckler & Smith, which was a [1658] complaint.

Now, that may be a little hard for you to separate in your minds, but I wish you would try to do it.

They are admitted on the issue of credibility of the witness Nicholas Winckler under what we speak of as impeachment. It is your function to decide whether there is impeachment, whether there is an attack on his credibility or there is not, following generally the instruction that I read to you.

They are not admitted for the truth or lack of truth, or anything, about what they contain.

I will just give you one example. In "Z," for instance, a broker wrote, "We received some samples of Anagold brand orange juice and cut these samples with several buyers that were somewhat interested. None of the buyers liked the quality of this orange juice for it has an aftertaste that is objectionable." That letter is not offered for any proof that the man received samples, that he cut the samples, that buyers were interested somewhat or were not, that none of the buyers liked the taste, or that the aftertaste was objectionable.

That is not the point. They are admitted for the question whether some notice was given to Winckler of a complaint generally on the issue of Winckler's credibility.

Let me wind up by saying, again, as I have told you many [1659] times before, you are the sole judges of the facts in this case; I am not. My rulings on evidence indicate only what evidence you may properly consider. You must decide all the facts in this case from all the evidence finally made in the record under the instructions that I give you. You must follow my instructions on law. I don't ever intend to comment on evidence. If anything I ever say looks to you like a comment, ignore it, because you are the sole judges of the facts. And don't try to outguess me as to what I may think one way or the other about the facts in the case.

Mr. Strachan: May it please the court, I think it might be helpful to the jury to understand that while they were excused we took some evidence out of their presence, and that that will be read from the transcript, and I can do that or perhaps your Honor could do it.

The Court: You may do it, Mr. Strachan.

That is what we were doing while you were away yesterday. Now the secret is out.

Proceed, Mr. Strachan.

Mr. Strachan: I have here Volume 14 of the stenographic transcript in which we were offering evidence, getting the judge's rulings on it, and in order that you wouldn't have to go into the technical part of it, we have arrived at certain rulings, and I propose to read, with the court's permission, parts of the testimony that were ruled admissible. [1660]

All of this testimony was testimony given by Mr. Winckler.

The Court: Let me add that the fact that we are reading it to you is to have the same effect as if the witness were here on the witness stand. We are just saving time.

Go ahead.

Mr. Strachan: Shall I identify page and line, your Honor?

The Court: Yes, if you will.

Mr. Strachan: I am now reading from transcript beginning on page 1570, line 4, to line 2 on page 1571.

The Court: Proceed.

(Whereupon Mr. Strachan commenced the reading of the record as follows.) [1661]

* * *

Mr. Strachan: * * * Now, referring to Exhibit AA received in evidence, a letter dated October 12, 1948, addressed to Mr. Charles C. Sink, of Winckler & Smith Citrus Products Co., by Graves-Chambers Co., Seattle, Washington, I am omitting the first paragraph.

Oh, do you want it read, Mr. Dixon?

Mr. Dixon: Yes, counsel.

Mr. Strachan: All right. I will read it.

"Dear Charlie:

"I am answering your note addressed to Doc because I made the call on Pat McCue and [1672] have followed up today with the samples which you sent us and which were received today.

"Charlie, while I was at National, Pat brought your old friend, George Paquette, in on the tasting

and they used a sample of their own Happy Home to compare with. Both of them stood there and swore up and down that your acid content was too high for them. I had the privilege of tasting both juices also and, to me, there was very little difference, but believe that the Happy Home did have a tendency toward more fruit sugar. I pointed out that they would have a hard time getting the same thing every time they purchased orange juice, but this had no effect.

"Pat said, 'I want to do business with Charlie Sisk but, in this particular case, I cannot because of the difference in the quality and the fact that his product does not come up to our standard.' If you get a run of extra sweet juice, please let us have two or three cans of it for this particular customer."

The Court: I want to comment again, following up what I told you, that this evidence which counsel has urged be admitted, and which I have admitted for a limited purpose, is something which you should clearly understand, that that [1673] letter is no evidence at all that Happy Home was a better juice, that whatever this sample was that they said tasted different is not evidence that it did, and it is no evidence about Pat wanting to do business with Sisk, no evidence that some product was not up to standard, no evidence of any of those things. It is merely evidence a broker wrote a letter to Winckler & Smith making some kind of complaint, right or wrong. You have to keep that in mind. This is the type of evidence that is dangerous unless the jury

understands the purpose for which it is [1674] admitted.

* * *

The Court: I made my rulings and I am stuck with them.

Again I call the jury's attention to the fact that these last two letters, like the rest, are no evidence whatsoever that this broker was unable to make the carload because he had only 650 cases. It is no evidence that the broker was at a loss to understand their methods of operation. It is no evidence at all of any of the things cited in this letter. The gist of it is, the only reason it is admitted is to show that a broker—it is for you to decide from the letter whether a [1682] broker made some kind of a complaint.

Proceed. [1683]

* * *

NICHOLAS J. WINCKLER

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, as I recall it, at the conclusion of your testimony yesterday, we were discussing the chaotic conditions of the Florida market—as I remember it, it was in the declining period of spring and summer of 1951. That confusion of the Florida

(Testimony of Nicholas J. Winckler.)

market had its effect on the citrus juice market for California products, did it not?

A. Yes, it did.

Q. You sent an Anagram to your trade, did you not, on that subject?

A. Well, we sent Anagrams regularly.

Mr. Strachan: I might mention to your Honor that in making these photostats, the text is not legible, so I have added a rider which makes legible the part that I am referring to. [1688]

* * *

The Court: Received in evidence, an Anagram.

(The document referred to was received in evidence as Defendant's Exhibit AS.)

Mr. Strachan: I will read this paragraph from the Anagram:

"California News.

"Confusion of the Florida market affects without question business in California. This is regrettable because there is no reason for such symptoms. Citrus processors in California have hardly any stocks to speak of, and stocks in the hands of distributors and chains are lower than usual."

Q. That is a correct statement of the market conditions as of the middle of May, 1951, is it not?

A. That is the way we saw it.

I would like to add that not every manufacturer sees market conditions the same way. Some people think the juice will go up, and other people think

(Testimony of Nicholas J. Winckler.)

that the juice is going to [1689] go down. The same as on the Stock Exchange.

Q. At the close of the Florida season do you recall that there was a supply of approximately 6 million cases being carried over as compared with 2½ million as of the year before?

A. No, I do not recall.

* * *

The Court: AT received in evidence.

(The document referred to was received in evidence and marked as Defendant's Exhibit AT.)

Mr. Strachan: "Market News. [1690]

"With the close of the Florida season, it is interesting to review the available supply"——

The Court: What was the date of this?

Mr. Strachan: June 23rd.

The Court: '51?

Mr. Strachan: '51, yes, your Honor.

The Court: Start again. I am sorry to interrupt you.

Mr. Strachan: "With the close of the Florida season, it is interesting to review the available supply of citrus juices which is at this time 6 million cases greater than a year ago. Assuming same movement between June and September as last year, the carry-over would run around 8½ million compared to 2½ million a year ago. However, it is anticipated by the trade that the 6 million plus is going to be

(Testimony of Nicholas J. Winckler.)

absorbed, if not by September, by the end of October due to three factors:

"1. Considerable faster movement due to much lower prices than a year ago.

"2. Increased requirements of the armed forces.

"3. Added merchandising effort of the Florida Citrus Commission." [1691]

* * *

Q. (By Mr. Strachan): Who is Pasco?

A. Pardon me. I didn't get the questioning correctly with the bulletin you just read.

The Court: The question is not about the bulletin. He has started something else.

Q. (By Mr. Strachan): Will you identify Pasco?

A. Pasco is regarded as the largest juice canner in the United States, probably in the world.

The Court: What does the name mean? Is it an abbreviation of the name?

The Witness: The name of the corporation.

The Court: Pasco?

The Witness: Pasco. I think it is named after a Florida county. [1692]

Q. Now, Pasco cut prices in July of 1951, did it not?

A. Well, counsel, I couldn't remember. They cut prices many times during the year and increased prices many times during the year. I don't know to which price cut you are referring to.

The Clerk: I have marked Defendant's Exhibit AU for identification, a letter.

(Testimony of Nicholas J. Winckler.)

The Court: AU marked for identification.

(The exhibit referred to was marked Defendants' Exhibit AU for identification.)

Mr. Strachan: I offer Exhibit AU. [1693]

* * *

(The exhibit referred to, marked Defendants' Exhibit AU, was received in evidence.)

Mr. Strachan: A letter written by Winckler-Smith over the signature of Mr. O'Hanlon, assistant sales manager, to George A. Mendes, New York City:

"We were very sorry to learn from your letter of July 12th that the Florida price quotations of 90c on # 2's and $2.25 on 46 oz. were so greatly below our quotations that Seeman Brothers were not interested any further in our California products.

"We are sorry that for the present it appears that Florida prices as shown in Pasco's quotations of this week are at so great a low that California cannot be competitive on the East Coast. Just how long this condition will continue to exist we do not know. We believe, however, that Pasco's drastic drop to $1.75 on 46 oz. f.o.b. Dade City, Florida, must be on an early pack of juice which they are trying to dispose of quickly at the present time.

"You will note from our recent Anagram that we have withdrawn our price quotations on Orange Juice and will quote on request only. This was done so that we can watch the price situation closely.

We notice the Pasco quotation on Grapefruit Juice has not changed from their previous $1.75 per dozen [1694] on the 46 oz. Pasco is stipulating only 50% of an order can be Orange Juice at the new low price and the balance must be made up of Blended Juice or Grapefruit Juice. From this you can see that Pasco's quotation is an unusual one and we think an adjustment will take place in the not-too-distant future.

"We are attaching a copy of a letter we wrote to your Syracuse office asking for co-operation in forwarding a sample to us of the Lemonade that is in the Syracuse warehouse. We have not heard from you directly since the writer talked with you over the telephone and we are very much interested in knowing whether we can count on your continued co-operation throughout your entire organization."

* * *

(The following proceedings were had outside the hearing and presence of the jury.)

The Court: The record will show the jury absent. You know, we live and learn. I suppose by the time I get old enough to retire and finish about 20 or 25 years on this [1695] court, I will know how to try a lawsuit. I have been trying to conduct this case fairly. I am not so sure that I haven't done a serious injustice to the plaintiff in permitting these impeachment letters in evidence.

I don't know how else it could have been handled unless to have limited the defendants to a mere showing that a certain letter of a certain date had

been sent and received, and the court could inform the jury it contained a complaint. But hearing these letters read full of factual assertions disturbs me very much. Twice I stopped to again call to the attention of the jury that those letters were not evidence of the alleged facts recited. Whether you can instruct a jury so that they will follow it, I don't know.

I feel maybe I have been unjust in this ruling, although it is a difficult problem to handle. You are entitled to impeach. It is a question of how to do it. Maybe it could have been done some other way. However, what harm is done is done.

If this was a criminal case where a man's liberty was involved, I would be very concerned about it, because certainly this business of reading letters, factual dissertations about this, that and the other thing, and having them read one after the other, and then telling the jury those letters are not evidence of those purported facts, I don't know whether it means anything or not. [1696]

I merely pause a moment to indicate my concern. Maybe there is some other way it should be done.

Mr. Dixon: May it please the court, I rise to make this comment. I know that counsel has a wide scope on cross-examination of a witness, but we have been on this cross-examination for several days on things which, many of which seem to me not to move this case forward or make any effort to meet any of the issues that at least the plaintiff feels are the real issues of this lawsuit.

The Court: Well, I will say this. I think most

of it at least has some connection. It is not so remote that it has to be kept out. I am, however, of the feeling that we have not progressed very far and that a lot of time has been wasted, that this could have been speeded up. Maybe not.

What suggestion do you have? You just want to register dissatisfaction, too, I take it?

Mr. Dixon: Well, your Honor, it poses a problem to me. I feel an obligation to the plaintiff here to at least try to go into some of these things that are set forth in the letters. Maybe I shouldn't. But I am frankly concerned about counsel reading into the record letter after letter here which, as far as I am concerned and can see, don't seem to deal with, well, possibly on the fringe, maybe, but not the real issues.

The Court: I have a lot of confidence in [1697] juries. I think when I get through instructing the jury, and the arguments are conducted, they will have this case shaken down to what the real issues of the case are.

Well, anyhow, I merely express my concern here. Maybe the better way would have been to require you to have merely used the letters without using the contents of them. Is there any way of doing that? I don't know.

Mr. Dixon: In some instances, Judge, where I have felt it had to deal with documentary evidence, the parts that are clearly irrelevant and immaterial, I submit certainly a lot of that has gone to the jury when he has read the letter in toto, when it could have been expunged from the document. Maybe

that is the only way we could deal with the problem.

The Court: That, still, of course, wouldn't answer the problem, because originally I thought there were going to be parts read, but you spoke up and wanted the whole letter read, at least the first one, and Mr. Strachan, to oblige, read the whole letter, but even if you try to take parts of it, suppose it is a complaint and you have a paragraph or two paragraphs of complaint. It is pretty hard to figure out how you could handle it without at least reading that part of the complaint, and the complaint may roam all over the field. The point is he made a complaint.

Mr. Dixon: May I say this, your Honor. Perhaps I misunderstood. Mr. Strachan is not reading the total letters [1698] here or all of the contents of the letters at my request at all. If that is what he is doing it for, he need not do it, because I know you have the privilege of reading any part of it to the jury in argument or any other time, but I am concerned about if we are going to have to go through another hundred or so of these letters. I asked Mr. Strachan yesterday when he thought he would complete his cross-examination and he told me by this noon. I have witnesses here.

The Court: How much longer will you be? Will you finish up this afternoon?

Mr. Strachan: I am quite sure I will.

The Court: If we have any more of these letters that go into the never-never land, we will stop the trial and have a pretrial, because that disturbs me. Maybe by the time I finish my 25 years up here, I

will know all the answers and know how to try a lawsuit. But sometimes you feel pretty [1699] inadequate.

* * *

Mr. Strachan: Might I take my turn in stressing my point of view on these letters? I did rise at one time to attract your attention, your Honor, because you had told the jury we had offered those letters for the purpose of impeachment. Actually, our offer goes beyond that.

The Court: I looked over to you.

Mr. Strachan: I know.

The Court: Of course, that is no error. If I made a mistake, if I did inadvertently say offered instead of received, the error, if any, rests in the ruling I made, and not in what I told the jury. In other words, they are not entitled to know whether you offered them for 50 purposes, but they are entitled to know what they went in evidence [1700] for. I misspoke myself. I stopped a time or two, but I don't recall seeing you indicating that you wanted to flag me down, so I went on.

Mr. Strachan: Another thing I want to say. I don't share the misgivings you and Mr. Dixon have on the effect, because I think your Honor has at least gone as far as necessary to limit the probative value in the jury's mind of those letters.

The Court: I think the jury understands. I watched them as I talked to them. When you try to talk to people informally and you see them nodding, and so forth, they are generally understanding. If a person is not so indicating, and begins to

get a blank expression on his face, you can generally tell when you talk to a jury whether they are understanding what you say, or whether they are confused. I have noticed that in this trial a time or two, but when I started to say something the jury looked pretty blank, but gradually they began to understand, and it was breaking through. I think the jury understands what I told them. I [1701] hope so.

• • •

NICHOLAS J. WINCKLER

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Winckler, do you recall that in July of 1951, under the date of July 6, 1951, Dickensheets-Potter Company advised you of a new low price at which Case-Swayne was booking orange juice in the Portland, Oregon, district? A. Yes, I do.

Q. And do you remember that advice took you somewhat by surprise, is that correct? [1702]

A. That is correct.

Q. The price which was quoted by—which was reported to you as being quoted, was $2.60 a case, is that not right?

A. I would have to see a letter.

Mr. Strachan: I will have this telegram marked.

(Testimony of Nicholas J. Winckler.)

The Clerk: And the letter attached?

Mr. Strachan: Yes, all as one exhibit.

The Court: Exhibit AV.

The Clerk: Defendants' Exhibit AV for identification.

(The document referred to was marked Defendants' Exhibit AV for identification.)

Mr. Strachan: I offer the exhibit in evidence, your Honor.

Mr. Dixon: Just a moment, counsel. What is the number?

The Court: AV.

Any objection?

Mr. Dixon: No, I guess not, your Honor.

The Court: It may be received in evidence.

The Witness: Yes, I recall now. And it was never verified. They talk about a new process of orange juice, and so on.

Q. (By Mr. Strachan): You were surprised to receive this message, weren't you?

A. I was surprised, but I couldn't verify it.

Mr. Strachan: I will read this [1703] memorandum.

"Winckler-Smith.

"Dear Garry:

"Too late to dictate, but I ran into some real competition when I started working juice. Case-Swayne are booking orange juice here at $2.60 for the balance of 1951 with full protection against decline. The unused portion of any contract may be

(Testimony of Nicholas J. Winckler.)

cancelled or accepted within 30 days after January 1, 1952. This just about covers everything. Have you heard of this elsewhere?" * * *

The Witness: Will you finish?

Mr. Strachan: Shall I read the rest?

The Witness: Yes.

Mr. Strachan: "They also claim to have some new process that duplicates fresh juice. Is there any truth in this? Case-Swayne broker indicates that Sunkist control 85 per cent of acreage, and that Case-Swayne controls the remaining 15 per cent. Give us the real facts. Regards."

Can you read that?

The Court: It is a man's name.

Mr. Strachan: Yes, sir, it is a nickname of some kind.

Q. (By Mr. Strachan): Do you recall you received on July 20th a telegram from Parrott & Company, a broker at San Francisco, saying that Case-Swayne was quoting $2.25 a case for [1704] 46-ounce orange juice? A. What date?

Q. It has the received mark of Winckler-Smith of July 24th, and I can't read the code of the date.

A. That is all right.

Q. Do you recall having received that?

A. Yes. [1705]

The Clerk: I have marked a telegram Defendants' AW for identification.

* * *

Mr. Strachan: I offer it in evidence.

(Testimony of Nicholas J. Winckler.)

The Court: Received in evidence, Exhibit AW.

(The exhibit referred to, marked Defendants' Exhibit AW, was received in evidence.)

The Court: If counsel doesn't have a copy, supply him with one, Mr. Strachan. [1706]

Mr. Strachan: I shall, your Honor.

The telegram reads:

"Winckler & Smith Citrus Products Co.,
"Anaheim, California.

"O Hanlon, Have Double Checked Case Swayne Quoting 2.25 for 46 oz. Orange Juice with Two's Relatively Priced. Advise.

"PARROTT & CO."

Q. Mr. Winckler, you are aware, are you not, that Case-Swayne & Co. entered into an arrangement for packing single-strength Valencia juice during the 1951 season with the Independent Citrus Growers and Shippers Association through Mr. Morgan Ward?

A. I was not aware of it. If my recollection is correct, I talked to Mr. Ward about that.

Q. When was that?

A. Around the time in question, in 1951.

Q. Can you fix the time in the summer?

A. When this telegram was received. When these communications have been received, inasmuch as the communication indicated that they are controlling the remaining 15 per cent of the fruit—when I mean they, I mean Case-Swayne stated that

(Testimony of Nicholas J. Winckler.)

they are controlling the remaining 15 per cent of the fruit available in California to processors, I got in touch with Mr. Morgan Ward and Mr. Morgan Ward told me that this is [1707] not so, he has nothing to do with the deal. He said that the Independent Fruit Growers are a rather loosely knit association and that certain members of the Independent Fruit Growers probably entered into a limited agreement with Case-Swayne, but he is not aware of the details. That is the information that I got in 1951 at my best recollection, and then later on I was told that the agreement was of very short life, was cancelled with Case-Swayne, so I didn't pay any more attention to it. It was in force for just a couple of weeks or something like that.

Q. Were you aware of the fact that throughout the season Case-Swayne continued to process single-strength juice under the arrangement made with Morgan Ward?

A. I could not check on that. I got contradictory information and I was told by Mr. Ward that Case-Swayne got a very nominal tonnage and they were busy with other products, inasmuch as more than 80 per cent of their products were other products but citrus juices, and later during the season I heard about a few spot quotations, but I could not verify that a large volume of business was done by Case-Swayne during 1951.

Q. Now, in your direct testimony, I believe you said when you went to Mr. Finley to see if you could get oranges from him to process into single

(Testimony of Nicholas J. Winckler.)

strength, he told you to go to Morgan Ward, is that correct? [1708]

A. I don't recall now definitely. It could be, but I have no definite recollection either one way or the other way.

Q. Do you have any recollection of going to the Independent Citrus Growers or Mr. Ward and trying to get——

A. That is what I tried to say. When you say Morgan Ward or Independent Fruit Growers, it means to me the same thing.

Q. Did you ever go to them and try to get an arrangement for a supply of fruit for single-strength processing similar to the arrangement which Case-Swayne had in 1951?

A. Yes, I did. I testified to that extent before.

Mr. Strachan: I ask that this letter be marked.

The Clerk: Defendants' Exhibit AX for identification.

(The exhibit referred to was marked Defendants' Exhibit AX for identification.)

Q. (By Mr. Strachan): Do you recognize Exhibit AX as a copy of a letter that you wrote?

A. Yes, I do. I recall the letter.

Mr. Strachan: This is the last letter in the series, ladies and gentlemen. I offer it in evidence.

The Court: AX received in evidence.

(The exhibit referred to, marked Defendants' Exhibit AX, was received in evidence.)

(Testimony of Nicholas J. Winckler.)

Mr. Strachan: Letter dated August 17, [1709] 1951.

"Independent Citrus Growers & Shippers Association,
"500 South Walnut Street,
"Anaheim, California.
"Attention: Mr. Morgan Ward.
"Dear Mr. Ward:

"We discussed yesterday with Mr. V. W. Borden, chairman of your by-product fruit committee, the uncomfortable situation that we have to face with regard to the supply of Valencia oranges.

"Our discussion was centered around the possibility that we buy from growers fruit which we would put through various packing houses owned and operated by the Independents in order to secure by-product fruit at a price comparable to our competitors.

"Mr. Borden, as well as Mr. Knott, had a full understanding of our problem and suggested that we write this letter.

"The contract of the Case-Swayne Corporation, negotiated a few weeks ago, was discussed and we made the statement that due to this contract the pace was set for canned juice prices for the coming season. These prices were entirely out of line with the fruit prices requested by the packers, which has made it impossible for us to pack canned citrus juices up to this writing. We pointed to the [1710] fact that it would have been more advantageous

(Testimony of Nicholas J. Winckler.)

from the angle of the Independents to offer the same deal to us which was offered to Case-Swayne, and by doing so to create in the interest of the Independents a competitive situation rather than a monopolistic situation. Such competitive situation would have probably have resulted in better return all along the line.

"We are very definitely under the impression that Mr. Borden shared our views. Moreover, when we consider that during the past two years we have purchased close to $1,000,000 worth of fruit from the Independents, we feel that a great injustice was done to us of entering into such a contract without even having had a chance to be consulted, or without any part of such surplus fruit ever being offered to us.

"At Mr. Borden's suggestion we are writing this letter for the purpose that this letter should serve as the basis of a discussion during your next committee meeting with the intention that from here on we should be supplied, for the purpose of single-strength juice canning, with an equal amount of fruit received in the past by Case-Swayne at terms and conditions similar to such contract." [1711]

There is more of the letter if Mr. Dixon wants to read it, but I will not read it at this time. [1712]

* * *

MORGAN U. WARD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Morgan U. Ward.

Direct Examination

By Mr. Dixon:

Q. Will you state your residence address, Mr. Ward, please?

A. 609 North Drake, Fullerton, California.

Q. I take it you are the Mr. Ward who was just referred to in the letter, in the correspondence, and the testimony of the witness?

A. I am. [1713]

Q. Will you state to the jury, Mr. Ward, what business you are engaged in?

A. I am engaged in several businesses, but do you mean relative to the citrus by-products?

Q. That's right.

A. I am the selling agent for the Independent Growers and Shippers Association, and since a year ago last September I am managing secretary of that association.

Q. Where is your office located, or your place of business?

A. Bank of America Building, Fullerton, California.

The Court: Let me ask you a question. You say

(Testimony of Morgan U. Ward.)

for the Independent Growers and Shippers Association; is that the technical name?

The Witness: That is the technical name.

The Court: We have had testimony here referring to the Independent Citrus Growers; is that the same group?

The Witness: I don't know what they refer to, but I imagine it is. But the technical name is Growers and Shippers Association.

The Court: That is the organization in connection with your name?

The Witness: Yes.

The Court: Are you also referred to as Independent Citrus Growers, sometimes? [1714]

The Witness: I have heard people in this room refer to us as that.

The Court: Or Independent Orange Growers?

The Witness: Independent group, and this, that, and the other.

The Court: All right.

Q. (By Mr. Dixon): Now, the Independent Citrus Growers and Shippers Association is what kind of a corporation, Mr. Ward?

A. It is a non-profit organization. It is put together by different independent shippers to get information industry-wise, have regular meetings, and discuss their problems along with a by-products disposal deal.

Q. Are the growers of oranges members of this association, or just what is their relationship, if any, to the association that you have just described?

(Testimony of Morgan U. Ward.)

A. The growers are not members, unless they just happen to be a shipper. We have most all shipper and packer members, and then we have another type of member that is an affiliate member that sells, like Arena Company. They are not packers, but they belong as an affiliate member. They are in the selling end of it.

Q. You are the managing or selling agent for this association, is that the proper description of your position with that association? [1715]

A. That is right.

Q. Does the association sell what we call fresh fruit? By that I mean oranges in the fresh fruit market, as distinguished from those that are sold for processing purposes? A. They do not.

Q. How long have you been engaged in the business of selling product fruit and oranges, particularly, to processors, Mr. Ward?

A. Well, I imagine about 22 years.

Q. Based upon your experience, and directing your attention particularly to the year 1951, will you state to the jury what the sources of product fruit would be or were during that year to independent processors of Valencia oranges into products?

A. Well, I think that the California Fruit Growers Exchange, it was called at that time——

Q. That is now known as Sunkist?

A. Sunkist, and the Mutual Orange Distributors——

Q. What is Mutual Orange Distributors?

(Testimony of Morgan U. Ward.)

A. It is a co-operative organization of growers.

Q. And——

A. And the American Fruit Growers, which at that time was not a co-operative, but it is now, and the Independent——

Q. Let's take them one at a time. Mutual Orange Distributors, I believe you mentioned as one of the sources of [1716] supply. Can you state to the jury, if you know, whether that company or association was selling or had for sale, to your knowledge, any amount of product oranges for processing purposes in 1951?

A. In 1951 they had a plant, I think they ran most of them. If they sold any outside, it was very little. None to my knowledge.

Q. What was the next one you mentioned apart from M.O.D.? A. American Fruit Growers.

Q. Will you tell the jury what American Fruit Growers is?

A. Well, at that time they were growers, packers and shippers of citrus as independents. Since then they have become a co-operative. At that time, in 1951, I think they were sending—I don't know for sure about the date, but I think they were sending their fruit at that time to the Golden Citrus Juices in Fullerton, California.

Q. Do you know or can you state of your own knowledge how much fruit, approximately, was available for sale or acquisition to independent processors from that company in 1951?

A. I don't know how much they had for sale,

(Testimony of Morgan U. Ward.)

but they had a contract with the Golden Citrus Juices, and anything they might have sold would have been over and above what they [1717] could run themselves, which I have no way of knowing how much.

The Court: You say they could run themselves; was Golden Citrus processing this juice for American Fruit Growers?

The Witness: I think the American Fruit Growers and Eadington Fruit Growers owned Golden Citrus. I think the two of them owned it at that time.

The Court: That is what you meant, then, when you said they processed for themselves; is that what you meant?

The Witness: Yes, sir, that is what I mean.

Q. (By Mr. Dixon): What other sources, if any, would be available or were available in 1951 to independent processors of citrus fruits for product oranges during that year?

A. Do you mean besides Exchange, M.O.D., and American?

Q. Yes, those that you have mentioned, if any.

A. Independent Growers and Shippers Association, which I sell their fruit, and there are some independent houses like Paramount Citrus, and maybe one or two others, outside of our group, which are independents but not belonging to the association.

That is about the extent of it that there is or was.

Q. Can you tell the jury whether either of those

(Testimony of Morgan U. Ward.)

latter two companies that you mentioned were disposing or had for sale, or otherwise available, to an independent processor, any substantial amount of oranges during the processing season [1718] 1951?

A. Well, I don't think Paramount sold anything. They were using all theirs and buying. The other ones I mentioned are packing houses. They sold, which wouldn't amount to much. Maybe one or two packing houses sold to independent processors.

Q. That amount from that source was negligible, or substantial, or—— A. It was negligible.

Q. Mr. Ward, in selling the oranges that were made available to you for sale, or otherwise to be disposed of, to processors in 1951, where the oranges were sold will you state to the jury how or what factors, or how you determined or arrived at the offering price of such oranges to such prospective purchasers?

A. I only sold a certain per cent of the available fruit, available for processing purposes, which I think would be approximately at that time, 12, 15 per cent. [1719]

The Court: Do you mean that you sold 12 to 15 per cent of all the product fruit available?

The Witness: In California.

The Court: In the California market?

The Witness: That's right.

The Court: Which would include process fruit from these other companies you have mentioned? Have you given us that as 12 to 15 per cent of that

(Testimony of Morgan U. Ward.)

total or 12 to 15 per cent of the fruit that came to the Independent Association?

The Witness: 12 to 15 per cent of all the fruit in the state.

The Court: No matter which company had it?

The Witness: Including Sunkist, MOD, American, and all of them.

The Court: All right.

The Witness: And naturally, when you are on a market where your competitors set the price, usually we took the California Fruit Growers Exchange price as the price. They at that time, I think, controlled about 70 per cent of the fruit, in that neighborhood, and we usually set our price at that price or at times, if the fruit was inferior, very little under.

I might add I think that any other fruit sold usually tried to get that price, too, outside of what we sold.

Q. (By Mr. Dixon): I am handing you Plaintiff's Exhibit [1720] 5, which is the price list at which Sunkist offered Valencia oranges to outside processors during the 1951 processing season. I will ask you to examine that exhibit, Mr. Ward, and state to the jury as to whether the prices contained therein were the prices, either higher or lower, or approximately the same, at which the oranges that you had for sale or available to processors were offered for sale?

A. Well, this is the price in 1951 that we tried to get, but we couldn't get that price on all our

(Testimony of Morgan U. Ward.)

fruit, or I would say we didn't get that price on about 80 per cent of our fruit.

Q. Are you familiar with the Bireley's, or the General Foods Processing plant here in Southern California?

A. That's right. I have sold them fruit for years.

Q. Did you sell them any fruit in 1951 to the best of your recollection?

A. I don't think we did in that year. That is about the only year we didn't. I think it was either 1950 or 1951. I don't recall, but I think it was 1951.

Q. Directing your attention to Hyland-Stanford, are you familiar with that company and that name?

A. Yes. I have sold them fruit, too.

Q. Will you tell the jury what business they are engaged in?

A. They are processing citrus oranges into concentrate. [1721]

Q. They are buyers, are they, of product fruit?

A. And they buy product fruit for that purpose.

Q. Did you sell that company any product oranges in 1951? A. Very little.

Q. Did you sell that company any product oranges in previous years?

A. Not very much. From year to year we sold them, but not to any extent.

Q. Now, directing your attention to the Mission Company, are you familiar with that name insofar as it relates to the processing business?

A. I am.

Q. Did you sell that company any product

(Testimony of Morgan U. Ward.)

oranges in 1951? A. No, I didn't.

Q. Did you sell that company any product oranges prior to 1951?

A. I have sold them lots of fruit. I bought their fruit for 10 or 11 years until 1946, and then after 1946 I sold fruit to them when I started working with the Independents—up until 1949, I think it was.

Q. You sold products oranges to them after that year? A. Not that I recall.

Q. Did you sell them, to the best of your recollection, [1722] after 1951? A. No.

Q. Now, did you endeavor to sell them any product oranges in 1949? A. Yes, I did.

Q. And do you recall with whom you had been dealing at Mission in making sales of your product oranges to that company in that year or prior to that year?

A. I had been dealing with Harry Crosby, Sr., and Irwin Seal.

Q. In endeavoring to sell that company, Mission Company, some product oranges in 1949, as in previous years, did you have any conversation with either of the parties mentioned with reference to their buying any oranges from you or through you during that year 1949?

A. Yes. Naturally, if you try to sell a man, you have to talk to him.

Q. And what reason, if any, was given to you as to why Mission wasn't buying any oranges from you, or didn't buy any oranges from you in 1949?

(Testimony of Morgan U. Ward.)

Mr. Strachan: I don't believe a proper foundation has been laid, your Honor, and I object for that reason.

The Court: Well, there is a debate about that, whether you have to lay it on direct or whether you should bring it out on cross. Sustain the objection. Lay the foundation. [1723]

Q. (By Mr. Dixon): Can you tell the jury approximately when these conversations or this conversation took place with either of these gentlemen in 1949 in which you endeavored to sell them product oranges in that year?

A. In the beginning of the Valencia season.

Q. And approximately when would that be?

A. May and June.

Q. And where did the conversations which you have mentioned occur? A. Over the telephone.

Q. And with these gentlemen that you have named? A. That's right.

Q. Can you specify which one it was?

A. Harry Crosby, Sr., and Seal, both.

Q. In other words, you had conversations with both of them? A. That's right.

Q. Will you state to the jury the reasons that either of these gentlemen gave you as to why they were not buying any oranges for processing purposes from you in 1949?

Mr. Strachan: Again I object, your Honor, that it hasn't been shown that these conversations are competent.

(Testimony of Morgan U. Ward.)

The Court: Are what?

Mr. Strachan: Are competent. There hasn't been a foundation—— [1724]

The Court: Overruled.

Q. (By Mr. Dixon): Do you understand my question, Mr. Ward?

Mr. Strachan: Specifically, your Honor, it is the hearsay rule I have in mind.

The Court: Specifically, your objection is overruled.

The Witness: In talking to Mr. Crosby and Mr. Seal, they said if they needed any oranges, they would let me know, but they had made arrangements for their supplies. They did not go into detail about it, except that on that basis, and I didn't sell them anything.

Q. (By Mr. Dixon): Did they tell you, if you recall, with whom such arrangements had been made? A. No, they didn't.

Q. Did you make any effort to sell Mission in 1950?

A. I made an effort to sell them every year, and in 1955.

Q. And what response did you get? Did you sell any? A. No, I didn't.

Q. And what reason, if any, was given to you by either of these gentlemen as to the reasons why they were not buying any oranges from you?

The Court: In what year?

Mr. Dixon: In 1950.

The Witness: I called them every year and en-

(Testimony of Morgan U. Ward.)

deavored to sell them, but I got the same answer, that if they need any [1725] fruit, they will let me know, they have their supplies taken care of.

Q. Now, Mr. Ward, you did sell some oranges to Winckler & Smith during the years 1949 and 1950, did you not? A. I did.

Q. Did the Independent Citrus Growers & Shippers Association, to your knowledge, enter into any arrangement with Winckler & Smith Citrus Products Company during the year 1949 pursuant to which oranges were made available to that company for processing purposes?

A. I think we sold them fruit at that time. I don't recall in 1949 on what basis we did work it out, but I know we did business with Winckler. [1726]

* * *

The Clerk: Plaintiff's Exhibit 54 for identification.

The Court: 54 for identification. It is also marked for identification as X, so we will tie it together.

(The exhibit marked Defendants' Exhibit X was marked Plaintiff's Exhibit 54 for identification.)

Q. (By Mr. Dixon): Mr. Ward, I hand you what has been marked Plaintiff's Exhibit 54 and ask you to examine the same, and after you have done so, indicate to the jury what that is, if you can.

A. That is an operating agreement we made with

(Testimony of Morgan U. Ward.)

Winckler & Smith the third day of August, 1949, that is the Independent Growers & Shippers Association, whereby we gave him a certain per cent of our fruit.

Q. Well, that is the agreement, the 1949 agreement, isn't it?

A. That's right, and signed by the managing secretary at that time.

Mr. Dixon: Plaintiff offers Exhibit 54 in evidence.

Mr. Strachan: No objection. [1727]

* * *

Q. (By Mr. Dixon): Mr. Ward, was there any arrangement, to your knowledge, comparable to that of plaintiff's Exhibit 54, entered into with Winckler & Smith in 1950?

A. I don't remember whether there was in '50 or not. There was in '51.

The Clerk: Your Honor, counsel is asking that the document heretofore identified as Defendants' Exhibit Y be given a plaintiff's exhibit number.

The Court: All right. 55 for identification.

The Clerk: Plantiff's Exhibti 55 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 55 for identification.)

Q. (By Mr. Dixon): Mr. Ward, I hand you what has been marked Plaintiff's Exhibit 55 for identification and ask you to examine that document and state to the jury, if you can and will, what it is.

(Testimony of Morgan U. Ward.)

A. That is a contract which we entered into—that [1728] was entered into with Mr. Winckler, Winckler & Smith Products, for concentrate, I think it was.

Q. Frozen concentrate?

A. Yes. And that was also signed by the managing secretary.

Q. And the date of that document is what?

A. The 6th day of August, 1951.

Mr. Dixon: Plaintiff's Exhibit 55 offered in evidence.

Mr. Strachan: No objection.

The Court: Exhibit 55 received in evidence.

* * *

Q. (By Mr. Dixon): Directing your attention to Plaintiff's Exhibit 55, Mr. Ward, can you state to the jury the approximate number of tons of Valencia oranges that were made available to Winckler & Smith under Plaintiff's Exhibit 55?

A. Is that the last one you gave me?

Q. That is the last one. Would you like it before you?

A. I don't recall how many tons there were.

The Court: Here it is.

The Witness: We agreed to make available 60 tons a day suitable for quality grade A frozen concentrate, or 360 tons per week with six operating days.

I don't recall the amount of fruit that we de-

(Testimony of Morgan U. Ward.)

livered on that basis, or how many weeks, but it was for the season that I remember it. [1730]

Q. (By Mr. Dixon): Would it be approximately 1,800 or 2,000 tons?

A. I think there was more than that.

Q. I take it you don't recall at this time?

A. I don't recall exactly. I would have to get my figures.

Q. Did your association make any other oranges, Valencia oranges, available to Winckler & Smith during the year 1951 for processing purposes?

A. We made available oranges for the school lunch program.

Q. Can you tell or do you recall about how many tons were thus made available?

A. I think about 2,300, or something like that, 2,400 tons. But I don't recall the exact number of tons.

Q. Those oranges were made available under the school lunch program?

A. That is right.

Q. That, I think, was previously described, so we won't go into it any further.

The oranges made available under the school lunch program, and Plaintiff's Exhibit 55, then, were substantially all of the oranges made available to Winckler & Smith by your association during the year 1951, is that correct?

A. That is right. [1731]

Q. Do you recall whether any purchases of oranges were made from your association in any

(Testimony of Morgan U. Ward.)

amount by Winckler & Smith in 1951, other than any that might have been made available to Winckler & Smith under Plaintiff's Exhibit 55 and the school lunch program?

A. We sold him some oranges on open account.

Q. Do you recall the approximate tonnage or amount of those oranges?

A. I don't recall the amount.

Mr. Dixon: That is all, counsel. Your witness. Just a moment.

Your witness.

Cross-Examination

By Mr. Strachan:

Q. You mentioned that one organization that sometimes had fruit available was Paramount, but you said in 1951 Paramount was not only using all of the fruit available to it from normal sources, but were buying. Do you recall that?

A. They bought fruit from me in '51. In other words, they didn't produce enough fruit through their packing house for their needs. They bought fruit from me for cash, and we also had a concentrate deal with them where they put up for our account.

Mr. Dixon: I'm sorry, counsel. It just occurred to [1732] me—I don't want to interrupt your cross-examination, but I would like to reopen the direct.

Mr. Strachan: I think it had better be done now, then.

(Testimony of Morgan U. Ward.)

The Court: Yes, I think so.

Mr. Dixon: Thank you, counsel.

The Court: Before we pass, though, let's clear one thing up.

Paramount was a packing association, was it?

The Witness That is right.

The Court: It had some growers that belonged to it?

The Witness: Yes; and they also had a juice plant.

The Court: All right.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. I believe, Mr. Ward, some reference was made to the arrangement that your association had with the E. A. Silzle Company in 1951——

The Court: Silzle or Case-Swayne?

Mr. Dixon: Case-Swayne. I am sorry.

Q. (Continuing): Can you tell the jury what that arrangement was?

A. We entered into a contract with Case-Swayne on single-strength juice. They put up for our account. And the fruit we sold them was fruit we could not sell at the [1733] $40 price, it was surplus fruit we didn't know what to do with, so we made a deal with them for single-strength juice. They put it up, and when all the costs were over and taken care of, plus 5 per cent profit for them, they returned the balance to us.

(Testimony of Morgan U. Ward.)

Q. In other words, the association had an arrangement with Winckler & Smith on the frozen orange concentrate, that is, to process frozen orange concentrate, under Plaintiff's Exhibit 55; is that correct? A. That is right.

Q. And in addition thereto the association had an arrangement with Case-Swayne to process oranges into single-strength juice, is that correct?

A. That is right.

The Court: That was processed for the account of the Independents?

The Witness: Yes.

The Court: Did they put your label on it?

The Witness: No. The used their label.

The Court: What do you mean for your account? Did the canned juice then belong to your association?

The Witness: No. They took the oranges, put them into processed form, sold them, and then returned to us—all costs plus 5 per cent, the difference we received back for the oranges. [1734]

Q. (By Mr. Dixon): Can you state to the jury approximately how many tons of oranges your association made available to Case-Swayne under this arrangement for processing into single-strength juice in 1951?

A. I can't recall exactly, but I think in the neighborhood of four or five thousand tons. [1735]

* * *

(Testimony of Morgan U. Ward.)

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Ward, you have been engaged in various aspects of the citrus fruit industry for some time, have you not? A. That's right.

Q. Since about what time?

A. 1933 or '34.

Q. Now, from about 1947 down through 1951, there was a change, as I understand it, in the demand for processed citrus juice, orange juice, in that there was an increased market for frozen concentrate in relation to single-strength juice, is that correct? A. That is true.

Q. Do you have in mind any particular figures to indicate to what extent the demand for frozen concentrate increased over the demand for single-strength juice?

A. I wouldn't know exactly, but I imagine—if you want a guess, I would say two to one.

Q. Now, during that period, say from 1947 to 1951, the available supply of oranges for processing into products was affected, was it not, by diminished acreage of orange groves? A. That is true.

Q. Is that a factor which lessened the availability of [1736] by-product oranges?

A. During that time I don't think that—I think that the size of the oranges put more on the market to offset it. I don't think it made too much difference that far back. I don't have the figures, but I know

(Testimony of Morgan U. Ward.)

that our fruit, we had just about as many oranges in 1950, 1951, as we had in 1947, that is in our group, but after that time the subdivisions and things came in, taking out groves, and the demand for concentrate began to go in the direction you are asking about.

Q. Does the Independent Association have any processing facilities of its own?

A. Have none at all.

Q. So it depends entirely on the independent processors for disposing of its by-product fruit?

A. That is true.

Q. Now, you said that in the Valencia season of 1951 Paramount was buying fruit in addition to processing all that it produced itself. At what prices were you selling that fruit to Paramount?

A. I was selling them at the market on what I sold for cash. I don't recall of very much under the market. But I made a concentrate contract with them which paid me quite a bit under the market.

Q. What kind of concentrate contract was that?

A. About the same as the one with Winckler, similar to [1737] that.

Q. And what was the general basis on which the fruit was delivered and accounted for, will you tell the jury briefly what that was?

A. I don't recall the details, but we set up a price on certain size cans. They took the fruit. They paid for the hauling. Then over and above a certain price, after they would take a legitimate profit, we got so much out of a certain pack and so much

(Testimony of Morgan U. Ward.)

out of another pack. I don't remember the details of the deal. [1738]

Q. That is, they sold the product and took what was allowed to them for various packs?

A. Yes, and returned the rest to us.

Q. And returned the rest to you. Whether that was above or below the $40 was your own business?

A. That is right.

Q. During the season of 1951 did you have a supply of fruit that was available for Winckler-Smith's operation at the same prices as it was offered to Paramount and the other independent processors, the outside processors I will call them?

A. All those contracts were written about the same.

Q. No. I am talking about your quotation on raw fruit, did you have fruit available which could have been delivered to Winckler-Smith on the same terms that you delivered to Paramount when Paramount bought fruit from you?

A. My price was the same price as the California Fruit Growers Exchange, $40 a ton on 120 pounds of solids, and when I couldn't sell it at that, I was forced to go into contracts, such as I did—I should say we did—with Paramount, with Winckler, and with Case-Swayne, which constituted better than 80 per cent of our fruit that season.

We couldn't sell a great percentage of it for $40 a ton because we had no more customers left. We had contracts, like Exchange had with Mission, Hyland-Stanford, [1739] TreeSweet, even Silzle. The

(Testimony of Morgan U. Ward.)

Exchange had deals the same as we did. And I only had three plants, Case-Swayne, Hyland-Stanford—I mean Case-Swayne, Winckler-Smith, and Paramount, that I could even get to run for me. All the rest of the facilities for running were taken up in the state.

Then I sold a little on the outside at the $40, smaller outfits, which amounted to very little.

The Court: You say facilities for running; are you talking about——

The Witness: Processing.

The Court: Processing frozen concentrate?

The Witness: All types.

The Court: Single strength?

The Witness: Yes, anything. There just weren't any plants that weren't running. I don't know of an idle plant during that time.

Q. (By Mr. Strachan): There were some plants that were not running for single-strength juice, weren't there?

A. Yes, there were some running for single strength altogether, there were some running for concentrate altogether.

Q. But there was a surplus of facilities available for single strength and concentrate, was there not?

A. I don't know of anyone else that could have run concentrate or run single strength that wasn't running at [1740] that time.

Q. That is in the summer of 1951?

A. As I recall it, it was in '51.

(Testimony of Morgan U. Ward.)

Q. Were you here in the courtroom when I introduced in evidence a letter which Winckler- Smith wrote to the Independents, to your attention, on August 17, 1951, advising that he would like a contract to process single-strength juice on the same terms that Case-Swayne was then processing?

A. I was. I read the letter.

Q. The Winckler-Smith single strength facilities were available and unused at that time, were they not? A. That is what I understand.

Q. Was that letter, if you know, submitted to the committee of your association?

A. It was read before an open meeting.

Q. Was it acted upon?

A. They left it up to me to deal with, which I did.

Q. You didn't award the contract to Winckler-Smith, did you? A. No, I didn't.

Q. Now, when did you enter into your arrangements with Case-Swayne for processing single-strength juice during the 1951 season?

A. Beginning of the season when the fruit was available. [1741]

Q. Approximately what time was that?

A. I don't recall exactly. I would say in June, some time in June.

Q. Did the arrangement which you worked out in June of 1951, continue throughout the season?

A. I think it did.

Q. About how long would that be?

(Testimony of Morgan U. Ward.)

A. The season usually lasts four to five months.

Q. Perhaps to sometime in November?

A. No. I would say September or October.

Q. But it was in effect throughout, from June to approximately October, is that correct?

A. That is true.

Q. Prior to writing the letter of August 17th, did you have any discussions with Mr. Winckler with respect to his desire to obtain a contract similar to the Case-Swayne contract?

A. Yes, we had a lot of discussion on it.

Q. When did those discussions commence?

A. Prior to that letter. I would say between the time I made the deal with Case-Swayne until that letter was written. I don't know exactly.

Q. That would be—— A. In a month.

Q. I think you said you made your deal with Case-Swayne [1742] in June?

A. Yes. And that letter was written when?

Q. In August.

A. It was from June to August. I don't recall exactly when it was.

Q. But it had been under discussion for six or eight weeks, perhaps, before the letter?

A. Maybe six or eight weeks, maybe three weeks. I don't recall. [1743]

Q. You say that you tried to follow the Sunkist prices. Did you at any time talk with Sam Kelly of the Sunkist organization, or anybody else, at to the level at which prices should be set?

A. Never have since I have been in business.

(Testimony of Morgan U. Ward.)

Mr. Strachan: I think that's all. Thank you.

Redirect Examination

By Mr. Dixon:

Q. Just one or two questions, Mr. Ward. Counsel suggested by his cross-examination that there was some reason why you didn't enter into a contract with Winckler & Smith for processing single-strength juice rather than giving a contract to Case-Swayne for that. Did Case-Swayne have any facilities available for processing frozen concentrate? A. No, they did not.

Q. At that time, in 1951?

A. They didn't then and they still don't.

Q. Will you state to the jury, if you can, how or why you determined to give Case-Swayne the single-strength juice arrangement, and the frozen concentrate arrangement to Winckler & Smith?

A. Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherewise. I knew that we were going to [1744] have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into

(Testimony of Morgan U. Ward.)

was with Case-Swayne for single-strength juice, orange juice.

Q. That was early in the season?

A. Early in the year. That was the first reason I gave him that part of it.

The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we would have our oranges out in the market competing in canned juice form, competing against each other.

Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason.

Q. Directing your attention to——

The Court: I have one question.

Mr. Dixon: I am sorry.

The Court: You say you had to enter into participating contracts. Do I understand from your testimony that the participating contracts returned you generally less per ton?

The Witness: That is true. [1745]

The Court: Then selling your oranges at $40 a ton?

The Witness: That is true.

The Court: You would have preferred to have sold your product oranges at $40 a ton?

The Witness: Absolutely.

The Court: But when you couldn't do that, then you entered into the participating contracts that you have described?

(Testimony of Morgan U. Ward.)

The Witness: That is what I had to do to get rid of them.

Mr. Dixon: You have asked the questions, your Honor, that I intended to ask. Thank you.

The Court: I thought you were going to something else.

Recross-Examination

By Mr. Strachan:

Q. Have these participating contracts been entered into over a long period of years as a means of disposing of surplus by-product oranges?

A. I think that was the first year we ever worked on a participating deal with any processor, because we were faced with a situation—I don't think in the whole history of the citrus business, the by-product situation had been any worse, as far as our standpoint is concerned.

Q. What was unusual about the situation?

A. Too much fruit. Too much fruit and very few [1746] facilities therefore to run it.

Q. Did the market conditions with respect to Florida product have any influence that year?

A. Oh, yes. It does every year. I think it has more effect on citrus products than any one thing.

Q. Would you say it has virtually a controlling effect on the price structure of California citrus products?

A. I think it has a great deal of effect.

Q. You would say that is the most important single influence on the price structure. is that right?

(Testimony of Morgan U. Ward.)

A. Year to year, I would say so.

Q. And it was in 1951, is that correct?

A. I think it had quite a bit to do with it at that time.

Mr. Strachan: Thank you.

Mr. Dixon: Just one more question.

Redirect Examination

By Mr. Dixon:

Q. It didn't have any effect on the amount of oranges that were on the trees and available for distribution in 1951, did it, Mr. Ward?

A. I don't think so.

Mr. Dixon: Thank you.

The Court: One more?

Mr. Strachan: I think there is one everybody has been [1747] wondering about.

Recross-Examination

By Mr. Strachan:

Q. When was the first time that you advised Mr. Winckler that Case-Swayne and you had one of these participating contracts?

A. When was the first time?

Q. Yes.

A. I don't recall the first time, but I know he kept asking me about it, and I didn't want to tell him. I thought it was my business and Case-Swayne's business, until those prices came out that

(Testimony of Morgan U. Ward.)

year referred to, and then I suggested to Mr. Winckler we have a deal, and I gave him the same reason that I just quoted awhile ago why he didn't get one.

Q. You think that was about July 6th when this——

A. It might have been July 30th. I don't remember.

Mr. Strachan: All right. Thank you.

The Witness: I don't remember. It was prior to that letter, because I know Mr. Winckler acts pretty quickly on those things if he thinks he is being left out. [1748]

* * *

(The following proceedings were had outside the hearing of the jury:)

Mr. Strachan: As to the admissibility of the three documents that have been shown me, I want to say this, that they are replies written by the defendant to letters that this morning were read, yesterday were received in evidence, from brokers.

Now, the court's ruling, as I understand it, was that these were admitted for a limited purpose, and you have many times instructed the jury that the letters were not to be regarded as bearing upon the truth of any of the statements made in them. This series of letters Mr. Dixon is proposing to mark will contradict the substance of those letters, but will in no way contradict the fact that the statement was made. So I think they are not admissible in view

of the limited purpose for which the brokers' letters, the Defendants' Exhibits, were admitted.

The Court: A similar thought was going though my mind. Do you know what you are doing? Do you want to make an issue out of these things?

Mr. Dixon: No, your Honor. [1749]

The Court: Presently it isn't an issue. If counsel got up on this record to argue that the fruit was inferior, or any of those facts, I would stop him. If you start putting them in, these letters refuting those facts, you are making an issue out of the very thing which you say isn't in issue.

Mr. Dixon: Your point may be well taken, your Honor.

The Court: I think you had better analyze this before you start to offer those letters.

Mr. Dixon: There is nothing in the replies——

The Court: The replies can't in any way contradict the fact that the Winckler-Smith Company got the letters of complaint.

Mr. Dixon: That's right, your Honor.

The Court: That is the only thing they went in for. I suggest you reserve that and think it over and reconsider it. That is your point, isn't it?

Mr. Strachan: Exactly.

The Court: I was thinking about it when I saw these letters being shuffled out.

Mr. Dixon: We have already had, I think, one reply, your Honor, and possible, to be consistent, that exhibit should be withdrawn.

The Court: Exhibit 52?

Mr. Dixon: Yes. I haven't seen it for some time,

so I don't know, but if we are going to follow that procedure—— [1750]

The Court: It may be withdrawn.

Mr. Dixon: I am not asking that at this time, but I will look it over. I think probably it should be if it went in under that theory.

The Court: That is the theory it went in on, but that was before we got into this thing. You can withdraw it, if you want.

Mr. Dixon: Yes.

The Court: It is withdrawn. [1751]

* * *

NICHOLAS J. WINCKLER

a witness by and on behalf of the plaintiff, having been heretofore duly sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Dixon:

Q. Mr. Winckler, I believe on your cross-examination by counsel for the defendants, in which he was inquiring into complaints that Winckler-Smith may have received, you stated that you had a complaint from Mr. Finley in 1947, when Winckler & Smith packed for him pasteurized orange concentrate. Quote: "His complaint was that there were black [1752] specks in the orange juice, in the orange concentrate."

Do you remember that testimony?

A. I do.

(Testimony of Nicholas J. Winckler.)

Q. You were also asked on cross-examination, Mr. Winckler, the following question by counsel for the defendant:

"Now, in the event that the product was not gaining, or any product was not gaining public acceptance, and the brokers were dissatisfied with the product, would that dissatisfaction, that lack of acceptance, be brought to your attention?"

And you answer was:

"It definitely would have been, because if a broker is dissatisfied he either would pick up the phone and call me from New York or Chicago, or would write a letter, and there is one thing that I will state, that not single letter was received by our corporation at any time that I wouldn't have read or seen it. If I was on a business trip they kept the letters, the mail, for me, pending my return. But to answer the question completely, I have no knowledge of any broker or customer dissatisfaction at all except on products which contained navel juice or was pure navel juice." [1753]

Now, Mr. Winckler, in stating that you had no knowledge of any broker or consumer dissatisfaction at all, except on products which contained navel juice or was pure navel juice, will you explain to the jury what you meant by that answer, and what you meant in answering counsel for the defendant with reference to the complaint which you referred to in the testimony I mentioned a moment ago?

Mr. Strachan: I don't think there is any am-

(Testimony of Nicholas J. Winckler.)

biguity in his answer that would justify an explanation.

The Court: Overruled.

The Witness: In the first place, we were talking about quality of juice, and any complaint or dissatisfaction, regardless if it would come from the broker or through the broker, would apply strictly to quality and not to other circumstances, like for instance a grocer keeping merchandise on the shelf for years or overpricing the merchandise, which is the grocer's responsiblity, and not the manufacturer's responsibility. So it refers strictly to quality.

The second comment that I want to make, in connection with my statement, is that I still feel, as stated before, that we had no complaints, because we don't regard complaints which are referring to a sample as a complaint. That is simply an indication of preference. Like somebody would say, "I prefer Schlitz beer compared to Budweiser beer," and there was no sale consummated. [1754]

And out of 15 beers, somebody would pick out the first beer, the second beer, and the third beer; that doesn't mean that the other 12 beers are no good.

The broker simply stated in these letters that the one juice has more acid, the other juice has less acid; the one broker wants sweeter juice, the other broker wants cheaper juice. I mean brokers generally speaking are serving the buyers, and they want

(Testimony of Nicholas J. Winckler.)

the top quality of fruit, the top quality of juice, at the lowest possible price.

At the early part of the season we couldn't produce that. Some buyers and some brokers accepted the early juice at the going price.

Secondly, other buyers, when the sample was submitted, they said, "Well, we will wait until the juice becomes of maturity." It was too tart, or too sour, or whatever the objection was.

But I don't regard it as a complaint at all. I regard as a complaint when the juice actually was sold, and then after the juice was sold the buyer would write a letter directly or through the broker that, "I bought from you six weeks ago or 30 days ago 500 cases of juice, and I have about 15 consumers who complained that the juice is no good." That I would regard as a complaint.

One more thing that I would like to add as an example here. Just like somebody goes to the butcher shop and wants [1755] to buy a pot roast, and the butcher takes out a pot roast, and the housewife says, "No, I don't want that pot roast, that is too fat, I want that one."

All right. That isn't a complaint. It is just an expression of preference.

Now, if the consumer takes the pot roast home and goes back the next day to the butcher and says, "Look, I fixed that pot roast, but it was so tough that we couldn't eat it," then that is a complaint.

So that is the light as I made my statement, and I think I still could maintain it. Besides the point

(Testimony of Nicholas J. Winekler.)

that I always made the reservation in my statements that according to my best belief and recollection.

I think in another part of my testimony there is something when I stated that the complaints didn't amout to one-tenth of a per cent. I think if my recollection is correct, there is something to that effect.

But even from the letters that counsel produced here, I still can't see any complaints whatsoever.

Q. You did use the word "complaint" with reference to what Mr. Finley said to you——

A. Oh, yes.

Q. ——in 1947?

A. I regarded it as a closed matter, because it was a very simple case. It came directly through Mr. Finley and [1756] didn't come through a middleman, namely, the broker.

Q. What was that complaint, using that term, that Mr. Finley had? Will you tell the jury again what that was?

A. Well, I think I testified that some black specks were found in the concentrate, and I recall I testified what methods Mr. Finley used in his plant to remove these black specks.

Q. What were these black specks, can you tell the jury what they were?

A. These black specks in our opinion were little residues, or—I don't know what other expression to use—which was collected around the stem of the orange, and which in the packing house could not have been removed or it wasn't possible to remove.

(Testimony of Nicholas J. Winckler.)

and these black residues were resulted from smudging which they used during the cold nights to keep the oranges from freezing, and the stem of the oranges is deeper than the skin, and the brushes don't get inside around the stem and are not able to remove that little left-over smudge. And neither we nor anybody else this particular year had any possibility to remove it. Mr. Finley used a hand operation with a dozen girls who tried to scoop it out with a little vacuum tube, when they were caught with the naked eye a little black speck. They just jumped on it just like catching flies and tried to remove it.

I witnessed that operation myself at the Ontario plant. [1757]

But we haven't been set up, and no one except Mr. Finley, to my knowledge, was set up to do such a costly hand operation.

Q. What was Winckler & Smith doing for Exchange Orange at this time in 1947 when this discussion occurred with Mr. Finley concerning the specks in the concentrate?

A. We were processing concentrate for the Exchange under an agreement, I don't recall exactly the terms of the agreement, but to use the trade expression we were running for the [1758] Exchange.

Q. Did you complete the contract for Exchange Orange?

A. According to my best recollection, we com-

(Testimony of Nicholas J. Winckler.)

pleted the contract and we delivered the merchandise and we have been paid for it in full.

Q. Do you recall when this discussion occurred with reference to the black specks in performing this contract?

A. You mean the year or the month?

Q. Approximately.

A. I am sorry. I don't have a recollection. It must have been during the 1947 Valencia season.

* * *

Mr. Dixon: May the record show that Plaintiff's Exhibit 56 for identification is a letter from Exchange Orange Products Company to Winckler & Smith dated May 23, 1947. Plaintiff's Exhibit 57 is a letter from Exchange Orange Products Company to Mr. Winckler as president of Winckler & Smith Citrus Products Company, Inc., dated August 4, 1947. Both exhibits are offered in evidence.

Mr. Strachan: No objection. [1759]

The Court: 56 and 57 received in evidence.

* * *

Q. (By Mr. Dixon): I hand you Plaintiff's Exhibit 56, Mr. Winckler. Will you tell the jury what that is?

A. This is a processing agreement between Sunkist or Exchange Orange Products, rather, and Winckler & Smith corporation to produce 65 Brix concentrated orange juice from Exchange oranges in our plant. We will process approximately 100 tons—when I mean we, I mean Winckler & Smith —are to process approximately 100 tons of oranges

(Testimony of Nicholas J. Winckler.)

per day, six days a week, into the concentrate. That concentrate is going to be shipped to England, to the British Ministry of Food. It has to be packed in 50-gallon barrles.

Do you want me to read all of it?

Q. No. Does that contain the arrangement under which Winckler & Smith processed oranges for Exchange Orange? A. No.

Q. Into concentrate?

A. Well, then, I should mention that we are paid per gallon of contentrate 85 cents, and so on.

Q. I don't think you have answered my question. Is this the arrangement?

A. That is the arrangement.

Q. After that arrangement was entered into on May 23, [1760] 1947, did you proceed to process oranges into concentrate or pasteurized concentrate? Is that what the product was?

A. That is correct.

Q. For the British Ministry?

A. That is correct.

Q. And in performing that contract or processing agreement, is that the one in which the complaint was made about specks being in the product?

A. I believe so.

Q. I hand you Plaintiff's Exhibit 57 and ask you to state what that was and whether that arrangement was entered into after the processing had been completed by Winckler & Smith under this Plaintiff's Exhibit 56?

A. It seems to me that that was a second process-

(Testimony of Nicholas J. Winckler.)

ing agreement, because the first one was dated in May and the second was dated August 4. Basically speaking, the agreement is similar, but in this agreement our compensation was somewhat different from the first agreement, but in character it is the same.

Now, I don't know in which one the specks occurred, if it was in the first run or on the second run.

Q. Was that arrangement fully carried out insofar as Winckler & Smith is concerned with reference to the processing of all oranges made available to Winckler & Smith by Exchange Orange under Plaintiff's Exhibit 57? [1761]

A. According to my best recollection, it was.

Q. And that occurred in the year 1947?

A. That is correct.

Q. Do you know whether the products so processed thereunder were in fact delivered to the British Ministry?

A. I don't know, because at the same time, like every year, the Exchange processed some other oranges and some other concentrate, and the concentrate was——65 Brix concentrate is a concentrate of standard consistency, let me use that word. In other words, most of the 65 Brix concentrate, part of it went probably to the British Ministry, part of it went probably to school lunch program, other part probably was used by the Exchange for other purposes. I don't think it was identified and earmarked which bottle went where.

(Testimony of Nicholas J. Winckler.)

Q. Mr. Winckler, state, if you will and if you know, whether Winckler & Smith was paid by Exchange Orange for anything that was due it for processing under that arrangement?

A. Definitely in full.

Q. And there was no dissatisfaction with the processing done by Winckler & Smith for Exchange Orange under those arrangements in 1947?

A. Except for the black specks.

Q. Except for the specks? A. Yes.

Q. Now, directing your attention to 1948, I believe [1762] there has been some testimony that during that year Winckler & Smith was in reorganization under Chapter XI. There has been some testimony as to whether or not at that time you had any conversation or correspondence with Mr. Finley or Exchange Orange with reference to having your—that is the facilities of Winckler & Smith process any oranges for Exchange Orange during that year. What is the fact, if you know, as to whether during that year, 1948, Winckler & Smith processed any oranges for Exchange Orange Products?

Mr. Strachan: Your Honor, I think the record is undisputed that the processing was done under the management of the court's officers. The negotiations leading up to the arrangement would not be admissible, because the whole matter was integrated into a written document, which was a contract between the Exchange people and the receiver, so I object.

(Testimony of Nicholas J. Winckler.)

Mr. Dixon: Are you objecting to the question, counsel?

Mr. Strachan: Yes, sir.

The Court: I got one ground, the court officer ground. Is there a second ground for your objection?

Mr. Strachan: In the prelude to his question, Mr. Dixon referrced to the fact that there had been some discussions between Mr. Winckler and Mr. Finley, but the fact is that the contract is a contract with the receiver, and none of the discussions Mr. Winckler had preliminary to the [1762a] receiver having entered into the contract could be admitted.

Mr. Dixon: The testimony was, your Honor, if you recall, Mr. Winckler had nothing to do with it. We propose by this questioning on redirect to show he directly had and the relations at that time were satisfactory.

The Court: Technically, your objection is the varying of a written document by parol evidence, is that what you are talking about?

Mr. Strachan: Or introducing negotiations leading up to it when there is a written document.

The Court: You contend the parties are the same here?

Mr. Strachan: Yes. I am quite sure they were, because Mr. Winckler, to the extent he was active in business, was an employee of the receiver who was in charge of the business and who was the contracting party.

(Testimony of Nicholas J. Winckler.)

The Court: The rule is that as to a contract between parties to a lawsuit, you can't vary the terms of that agreement by statements which might indicate the contrary sense from that shown in the agreement. However, this contract apparently was between a certain receiver in 1948 and the EOP.

Mr. Strachan: That's right.

The Court: That is not the same receiver or the same trustee that is bringing this lawsuit.

Mr. Strachan: No. This is prior. [1763]

The Court: Therefore, it isn't the same parties, unless you indulge in the fiction that the——

Mr. Strachan: No.

The Court: ——unless you indulge in the fiction that there is some entity that flows through here that means that Walker is sitting there as trustee, and the prior trustee and the corporation are all one and the same people.

Mr. Strachan: No. That is another proposition, your Honor.

The Court: You don't contend for that?

Mr. Strachan: No, sir.

The Court: Then the objection is overruled. However, I don't think we are so much interested in the conversation, what was said, as in what was done. [1764]

* * *

Q. (By Mr. Dixon): I will hand you, Mr. Winckler, what has been marked Plaintiff's Exhibit 58, the same being a letter addressed to you as president of Winckler & Smith Citrus Products,

(Testimony of Nicholas J. Winckler.)

Inc., dated August 19, 1948, signed by James A. Finley, Manager of Exchange Orange Products Company, and ask you if you received that letter from him?

A. Yes. This letter is addressed to me as president of Winckler & Smith, August 19, and I have received the letter.

Mr. Dixon: Plaintiff's Exhibit 58 is offered in evidence.

Mr. Strachan: Object. It isn't material. It is a document leading up to the written contract which was later entered into between the receiver and Exchange.

The Court: Who was the receiver in 1948?

Mr. Irwin: Mr. Lynch.

Mr. Fisher: E. A. Lynch was the receiver.

The Court: I think both of you are straining at something that is of no particular issue here. I don't know what happened in this case, but let's take a stab at it. Receivers are appointed by the court and they are court officers. Receivers don't go down and turn the motors and feed the bins and run the plant. They have people to work for them, and generally the employees and officers of the conporation in reorganization are kept on to assist. I would guess that is what happened in this case.

Mr. Dixon: That's right. [1765]

Mr. Strachan: That's right, but over and beyond that, when the receiver makes a contract, that means the contracting party gets paid for what

(Testimony of Nicholas J. Winckler.)

he is furnishing under the contract as an expense of administration and doesn't depend upon the credit of the corporation in receivership.

Mr. Dixon: If the court please, this document is being offered in evidence to show that during this period Exchange Orange, in spite of the inferences of previous complaints concerning the processing by Winckler & Smith, of the specks incident, so-called, that they were wholly immaterial and insignificant, and this letter clearly indicates that Mr. Finley was dealing with Mr. Winckler and company at this time and willing to do so.

The Court: Certainly it is admissible on the other issue anyway. The objection is overruled. Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 58, was received in evidence.)

Mr. Dixon: Ladies and gentlemen of the jury, the letter is rather brief and I would like to read it to you. It is addressed to Mr. Winckler as president of Winckler & Smith Citrus Products Company, Inc., 408 South Atchison Street, Anaheim, California. It is dated August 19, 1948.

"Dear Mr. Winckler:

"Confirming our discussion regarding credit arrangements on oranges for your Government Contract [1766] No. A1PM/M/1273, I think satisfactory arrangements can be made if the following points are covered in an agreement:

"1. We furnish to you a maximum of 5,000 tons

(Testimony of Nicholas J. Winckler.)

of juice grade oranges at a price of $30.00 per ton, f.o.b. the packing house, to be taken by you before October 8, 1948, at the rate of not more than 1,000 tons per week.

"2. The merchandise to be protected by Lawrence Warehouse receipts and finished products to be examined by the AMA every other operating day and AMA certificates obtained.

"3. The proceeds from the Government to be assigned to The Exchange Orange Products Company or to the bank and the bank to pay us up to the full amount advanced before any other creditors.

"If a court order is satisfactory to us, I will have our attorneys write up an agreement." [1767]

Q. (By Mr. Dixon): Mr. Winckler, you were still at the plant of Winckler & Smith at the time this letter was written and received?

A. Yes, I was. I was working under the Receiver.

Q. Do you know whether in fact oranges were processed under any arrangement for Exchange Products pursuant to and subsequent to this letter, Plaintiff's Exhibit 57?

A. I recall that approximately 4,700 tons of oranges have been processed by the same technical staff under my supervision than in previous years.

Q. Mr. Winckler, there has been some reference in your cross-examination to navel juice. I am not sure that you have testified or informed the jury as to the approximately percentage of your total production of citrus juices that was in that category.

(Testimony of Nicholas J. Winckler.)

namely, navel juice. Can you tell the jury what it was in 1950?

A. I think I did testify as an average the percentage of navel juice that we processed, either as navel juice or as blended juice, was very small compared to Valencia.

Q. On cross-examination, Mr. Winckler, counsel suggested, I think, that there may have been two sets of books kept by Winckler & Smith, because there were apparently two valuations that were placed upon the property of Winckler & Smith after the reorganization.

Mr. Strachan: I would like to see a record reference to [1768] that. I don't recall it.

I will object unless the record reference be shown.

I don't think I made the suggestion that counsel's question assumes that I did.

Mr. Dixon: I said it was suggested that there were two sets of valuations kept by this company.

The Court: I don't think there was any reference to two sets of books made. What inferences you might have drawn or what inferences the jury might draw, I don't know.

Mr. Dixon: That is the inference that I drew. It was my inference.

The Court: If this is material to clear up some issue, you may proceed. The jury will have to recall what was said. I personally recall no reference to two sets of books.

Mr. Strachan: There was none, your Honor,

(Testimony of Nicholas J. Winckler.)

and I think Mr. Dixon should rephrase the question without that assumption.

Mr. Dixon: Will you read the question, Mr. Reporter?

The Court: Rephrase it without having it read.

Mr. Dixon: Let's mark this, first.

Mr. Strachan: That question is withdrawn, I take it, or the objection sustained, one or the other?

Mr. Dixon: I will restate the question.

The Court: Strike the question out, and I instruct the jury to disregard it. [1769]

The difficulty is that you said too much. You may have drawn an inference. I don't know. Maybe somebody else drew an inference. But you certainly can ask the witness if he kept two sets of books, or if he had two or three sets of valuations. So reframe you question and proceed.

Q. (By Mr. Dixon): During the cross-examination, Mr. Winckler, I think you referred, or reference was made to the fact that there were two different valuations placed upon the property of Winckler & Smith; do you recall that? I don't have the record before me, counsel.

A. My recollection is that that matter was brought up in the manner that we kept two inventory values.

If my recollection is correct, these values applied only to years after the first reorganization where the plant was sold and repurchased from a certain group of stockholders. But we never kept two sets of books, or anything of that nature.

(Testimony of Nicholas J. Winckler.)

Q. Let's forget the two sets of books. I am talking about two valuations, Mr. Winckler.

The Clerk: I have just marked Exhibit 59 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 59 for identification.)

Q. (By Mr. Dixon): I am handing you what has been marked for identification as Plaintiff's Exhibit 59, the same [1770] purporting to be a United States Corporation Income Tax Return for Winckler & Smith Citrus Products Company for the year 1949.

The Court: Is that the year ending January, '49?

Mr. Dixon: No; the year ending January 31, 1950, but it is a 1949 return, as far as the government is concerned on its form.

Q. (By Mr. Dixon): I direct your attention, Mr. Winckler, to a third sheet, namely, Schedule D, relating to the sale of property other than capital assets, April 3, 1949. Will you tell the jury, if you can, what the date August 3, 1949, means, if you know, on this return?

A. The date April 3, 1949——

The Court: Wait a minute. Somebody said August and somebody said April. Which is it?

Mr. Dixon: It is April.

The Court: All right.

The Witness (Continuing): ——is the date when the plant was sold, under an option to repurchase.

(Testimony of Nicholas J. Winckler.)

Q. (By Mr. Dixon): Does that Schedule D contain two columns, one headed "Cost Values" and the other "Appraisal"?

A. That is correct.

Q. And the total amounts under the items contained therein differ, do they not?

A. They do. [1771]

Q. Do you know the purpose, or can you tell the jury why these two items, Cost Value differs from the Appraisal Value, as set forth in this exhibit and Schedule D therein? A. Yes.

Q. Will you state to the jury why they differ?

A. Prior to the date we had our fixed assets, machinery, furniture, fixtures, land, buildings, equipment, and so on, on our books at the value of the periodical appraisal value, and we took our depreciation permitted under the law on that value. On the other hand, when the plant was sold for substantially a lower price under that lease-option agreement, we had to show, to conform with the tax laws, both evaluations.

Q. All right.

Now, directing your attention to item 12, subsection (c), it provides net gain or loss from sale or exchange of property other than capital assets from Schedule D, I notice the figures $46,867.81; is that the loss taken in this return by the corporation on the sale of such assets? A. That is correct.

Q. In other words, that is the difference between the cost value and the appraisal value?

A. That is the difference between the depreci-

(Testimony of Nicholas J. Winckler.)

ated value as carried on the books for tax purposes, under which we had to pay our taxes, and the actual return on the plant, [1772] sold under the lease-purchase arrangement.

Mr. Dixon: Plaintiff's Exhibit 59 offered in evidence.

The Court: Exhibit 59 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 59)

Q. (By Mr. Dixon): It has just been directed to my attention, Mr. Winckler, that you may have misunderstood my question, or used the wrong description for it. The first column is the cost value or book value, and not the appraisal value. Will you state whether that is or is not the fact, and if so whether you wish to correct it?

A. That is correct. I have no recollection that I mixed up the two columns.

The Court: Well, the exhibit says "Cost Value" in one column, and "Appraisal Value" in the other column.

Mr. Strachan: I think that is the way the witness testified to it.

Mr. Dixon: I thought so, too.

Q. (By Mr. Dixon): Mr. Winckler, were the Lawrence Warehouse facilities available to Winckler & Smith all during the period 1949, '50, '51?

A. Yes, they were. [1773]

* * *

ROBERT HODGE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: My name is Robert Hodge.

The Court: H-o-d-g-e?

The Witness: Yes.

Direct Examination

By Mr. Dixon:

Q. What is your residence address, Mr. Hodge?

A. I live at 349 North Ridgewood Place, Los Angeles.

Q. What is your business or profession?

A. My business is certified public accountant.

Q. This may be a rather long examination, Mr. Hodge, so if you will just keep your voice up so that the farthest [1782] one in the jury box can hear your answers to my questions, I think it will be helpful.

I believe you stated you are a certified public accountant? A. I did.

Q. That is, you are licensed by the State of California to practice public accounting as a CPA?

A. I am.

Q. When were you so licensed, Mr. Hodge?

A. 1932.

Q. And what business or profession have you been engaged in since that time?

(Testimony of Robert Hodge.)

A. I worked with Price Waterhouse & Company for approximately 10 years, and I——

Q. Will you tell the jury who Price Waterhouse are?

A. Price Waterhouse & Company are probably the largest firm of certified public accountants in the country.

Q. What did you do when you left Price Waterhouse?

A. I went in business with another CPA as a partnership. That lasted until about 1945.

Then I practiced under my own name until a few years ago when I took in one of the members of my staff as a partner.

The Court: Keep your voice up.

The Witness: I'm sorry. [1783]

Q. (By Mr. Dixon): Mr. Hodge, again, if you will try to throw your voice out into the room, possibly by opening up your mouth a little wider, it may throw your voice a little further.

How long have you had your own accounting firm, Mr. Hodge?

A. You mean in association with other CPA's as partners and——

Q. Yes. A. About 15 years.

Q. And during that period of time have you become familiar with or had occasion to do any accounting work for Winckler & Smith Citrus Products, Inc.?

A. Yes. When the partnership was terminated and the corporation was formed, I took over the

(Testimony of Robert Hodge.)

accounting from my then partner, Mr. [1784] Moore.

Q. And you have handled the books of that company, that is to say, you have made the operating statements and balance sheets and tax returns for that company since that period of time?

A. I have prepared financial statements, except during the period of reorganization under Chapter XI, since that time, yes.

Q. Now, Mr. Hodge, in our examination we are going to have occasion to refer to certain terms, and so that the jury may understand what you are going to talk about I am going to ask you to, in as brief a statement as possible, to try to indicate what some of these terms are, what they mean.

Now, I am first going to refer to the term income account as it will be used on some of the documents and exhibits that will be hereafter referred to. Will you state to the jury what in accounting practice, and particularly with reference to the statements of Winckler & Smith Citrus Products Company, that term "income account" means?

A. The income account is the summary of all of the operating accounts that a firm keeps in its various accounting records, particularly the general ledger, which we summarize to put on a little statement so that it is clearly understandable, I hope, to show what the net results of the operations of the company are for that particular period under review. Is that clear enough? [1785]

(Testimony of Robert Hodge.)

Q. That is, the net results of the operations of the company for a particular period of time?

A. That's right.

Q. By net results what do you mean, whether there was profit or loss during the period covered?

A. The final figure shows the net profit or loss for the period under review.

Q. Were these income accounts, so-called, prepared by you on an annual or semi-annual basis for Winckler & Smith?

A. Except during Chapter XI, and up to the time of the Chapter X, I believe in '49, I prepared semi-annual reports on the operations of Winckler & Smith.

Q. Now, can you tell the jury what is meant by a fiscal year?

A. A fiscal year is a year of operations that is adopted by a firm, corporation, partnership, or otherwise, other than a calendar year. That is, it could terminate any time.

Movie companies, for instance, terminate their fiscal year on a weekly basis. However, most firms terminate their years at the end of a calendar month.

The Court: Here the fiscal year of Winckler & Smith terminated January 31st?

The Witness: That is right.

The Court: So it ran from February 1st of one year to [1786] January 31st of the following year?

The Witness: That is right.

Q. (By Mr. Dixon): And the annual operat-

(Testimony of Robert Hodge.)

ing statements of the company, and the tax returns of the company, were prepared on that fiscal year basis, insofar as Winckler & Smith is concerned; is that correct? A. That is right.

Q. What items are generally contained in the income account statement which you prepared on a semi-annual basis?

A. For Winckler & Smith?

Q. Yes. From now on we are talking entirely about Winckler & Smith unless it is indicated otherwise.

A. The normal form of the income account for Winckler & Smith would start out with the sales, less cost of sales, less selling expenses and administrative expenses; then there might be some miscellaneous income expense—— [1787]

The Court: Keep your voice up a little bit. It is hard to hear in this room.

The Witness: I am sorry, Judge. Normally your income account would start out with your sales, less your cost of sales.

The Court: Less your selling expenses and less your administrative expenses?

The Witness: And there might be some sundry items not normally considered operating expenses or income, and the final figure would be the net profit or loss for the period.

Q. (By Mr. Dixon): Will you explain to the jury what would be included in sales? That may be almost self-explanatory, but I will ask you to tell the jury what that item is.

(Testimony of Robert Hodge.)

A. Sales would be amounts received from customers from the sales of their products. Well, I should straighten that out a little bit. It would be the amount charged to customers during the period under review for products sold to them.

Q. In other words, as I understand it——

The Court: Just a minute. These books were kept on an accrual basis?

The Witness: That's right.

The Court: And not upon a cash basis?

The Witness: That's right. [1788]

The Court: There are two distinct methods by which books are kept?

The Witness: That's right, Judge.

The Court: If you keep a set of books on a cash basis, you would list in sales the money as the company received it.

The Witness: That's right.

The Court: If the books are kept on an accrual basis, then you would list the sales as soon as they are made or charged regardless of when the money came in?

The Witness: As they are invoiced and delivered.

The Court: Accrual, by the same token, on a set of books that was kept on an accrual basis, everything else would be kept on a basis of when the obligation was incurred and not when the money came in or was paid?

The Witness: That's right.

The Court: So if you bought a thousand dollars

(Testimony of Robert Hodge.)

worth of insurance, it would be charged on the books as of the day the obligation was incurred?

The Witness: That's right.

The Court: Even though you might pay for it next month or next year.

The Witness: That's right.

The Court: There are two standard methods of keeping books, the cash method and the accrual method, and these were kept on the accrual [1789] method?

The Witness: That's right.

Mr. Dixon: Thank you, your Honor. That will save some time.

Q. Now, Mr. Hodge, will you indicate to the jury what is meant by the term balance sheet?

A. The balance sheet is a term used to show the assets and liabilities at a given time. It differs from an income account in that it is at a certain time, whereas your income account goes from the beginning of the period to the end of the period. It tries to show a picture of all the company owns and owes as of that date.

The Court: Well, let's stop again. There are also two methods of bookkeeping. One would be called the single-entry method, and the other would be the double-entry method. At least there are those two, are there not?

The Witness: There are two, Judge.

The Court: In a single-entry method of bookkeeping, to take a crude example, I might keep a list on a sheet of paper of the money I paid out

(Testimony of Robert Hodge.)

and of the money that came in, and a few little notes on a scrap of paper. There would be no way——

The Witness: To balance.

The Court: To keep a balance.

The Witness: That's right.

The Court: But in a set of double-entry books, each [1790] time there is a charge on a ledger or account, there has to be a credit somewhere to some account.

The Witness: That is true.

The Court: So that eventually in a double-entry set of books, when you get a balance sheet out, then all the things that are listed as credits equal all the things that are listed as charges.

The Witness: With the income account taken into consideration, too. I mean the two of them dovetail.

The Court: Yes, but eventually you get a balance.

The Witness: That's right.

The Court: In which the two columns are alike.

The Witness: That's right. Total assets and total liabilities and net worth equal each other.

The Court: So if, for insance, a company had a net worth of $10,000, and then during a certain period they make money, when that balance sheet was balanced out and the two totals were the same, there would probably be a bigger figure for the net worth, other things being equal, than there was before.

The Witness: That is true.

(Testimony of Robert Hodge.)

The Court: But still the totals would balance, the total assets and total liabilities.

The Witness: Yes.

The Court: Is that right, generally? [1791]

The Witness: Plus the net worth, the liabilities plus the net worth will always equal your assets.

The Court: So if a firm lost money, on your balance sheet the total of assets and liabilities would still equal, but the net worth might decrease during that period?

The Witness: Would be reduced by the amount of your loss.

The Court: This was a double-entry set of books, where the——

The Witness: Yes, this was the standard double-entry set of books where every debit has to have a credit.

Mr. Dixon: I am not sure, Mr. Hodge, if Juror No. 1 can hear your answer.

Juror Daiker: Yes, I can hear.

The Witness: This was the normal double-entry set of books where every debit had a credit.

The Court: Before we go any further, let's go back to what is meant by the operating statement or the balance sheet. How many of you jurors have had any experience in bookkeeping? Raise your hands.

Well, how many have not? How many don't know anything about books?

All right. Let's take one simple little thing. When a company operates, Mr. Witness, you say you start out with a figure of their sales. [1792]

(Testimony of Robert Hodge.)

The Witness: On the operating statement, yes, sir.

The Court: So you get a figure which represents all the sales that they made, in this case on the accrual basis, that is, for instance, the sale is made and whether the money has come in yet or not, that was a sale.

The Witness: That is true.

The Court: Then you deduct from sales the cost of making these goods that were sold.

The Witness: That is true.

The Court: In other words, if you sold a million dollars worth of goods and it cost you a half million dollars to make those goods, you start out, and to begin with it looks like you might have a half million dollars profit.

The Witness: That is true.

The Court: Then you would next have to deduct, after the cost of making these goods, there would be labor and materials that went into them, then you would have to deduct, also, other expenses which you would call your administrative expenses—or do you have some other term for it?

The Witness: The next common form is to take out the selling expense, in other words, it cost you so much to sell the goods.

The Court: So you might pay commission to salesmen?

The Witness: Sales, salaries, and so forth.

The Court: Where would you take out the cost of shipping the goods? [1793]

(Testimony of Robert Hodge.)

The Witness: That would be normally in your cost of sales.

The Court: Now, what would you include under the administrative expense that you would have to deduct to see what profit you make?

The Witness: Your administrative expense would include your executive expenses, your office expenses, and financing expenses, and things of that nature.

The Court: Now, you would have expenses, such as taxes or rent, if you rented a building, or you would have——

The Witness: The rent could be for the most part up in cost of sales. In other words, the cost of the factory portions. Whereas the rent of your offices would be down in administration.

The Court: But they come off one place or another?

The Witness: That is right.

The Court: Suppose you had vehicles and trucks and had to buy gasoline and repair them, that would be taken off, too, wouldn't it?

The Witness: That would be in one place or the other. Trucks for the shipping of the fruit, and so forth, would be under your cost of sales; whereas your salesmen's cars would be under selling expenses. Your executive cars would be under your administration expenses.

The Court: So all legitimate expenses that a company would have would then also be deducted so

(Testimony of Robert Hodge.)

that from this gross figure what you got for your goods you would deduct [1794] your cost of sales and all your expenses?

The Witness: That is true.

The Court: When you got done with that, then you would have your net operating profit?

The Witness: That is true.

The Court: That is not the end of the story, yet, is it, in the set of books?

The Witness: No. That is merely the figure that is carried forward to your balance sheet as you increase or decrease your net worth.

The Court: Talk to the jury. Say that again.

The Witness: The net results from operations during your period of audit is then carried forward to your balance sheet, which presumably balances your balance sheet by increasing or decreasing your net worth.

The Court: So this figure of net worth, then, that is in this balance sheet, which the totals are always equal, either increases, if you make money, or it decreases if you lose money?

The Witness: That is true.

The Court: So with this operating statement you are able, then, to take your balance sheet and draw your two totals, which balance as to assets and liabilities?

The Witness: That is true.

The Court: If you have a situation, after you have gone [1795] that far—you still have many other accounting problems, I take it, or may have

(Testimony of Robert Hodge.)

other problems? Supposing the corporation—let's take one example; it may be pertinent here or may not; I haven't seen the statement; but under the tax laws a corporation has the right in certain instances to carry a loss forward or carry a loss back?

The Witness: That is true. Under the Revenue Act of 1954 a corporation, and individuals have the same right, have the right to carry a loss back to the previous years' operations, and if the corporation has made money and paid an income tax, they have a right to a refund of the portion that can be carried back from the present year's loss; if that income is not large enough to absorb this loss, they have the right to carry that forward for five succeeding years.

The Court: Let's just take that a little further so we will see what you mean.

A certain corporation, we will say, in a certain year sustained a loss, it has filed its income tax returns with the Federal Government, and since it sustained a loss it didn't pay any tax?

The Witness: That is true.

The Court: Now, the next year it made a lot of money——

The Witness: Let's take the loss back to the previous year, first. [1736]

The Court: Just a minute, now. We have got a case where it lost money in a certain year, but in the previous year, we will say it made some money and paid a tax, it would then file, would it not, an amended return——

(Testimony of Robert Hodge.)

The Witness: No, sir.

The Court: A new return?

The Witness: No. The present procedure is to carry—is to prepare a carry-back form——

The Court: Return?

The Witness: No. Just a form, which allows you to carry the loss back to the previous year.

The Court: What I am getting at is—I don't care what you call it——

The Witness: I am sorry if I am a little too precise.

The Court: I am not using the proper terms. Actually to carry the loss back to the year before when you made money there have to be some computations made so you carry that loss, or a part of it, back and then you recompute it and find out what tax would be paid on that basis, and then maybe you get the tax back that you paid?

The Witness: That is true.

The Court: If the company makes money a certain year, you say there are provisions where it can carry—loses money a certain year, there are provisions so that you can carry those losses forward to other years? [1797]

The Witness: That is true.

The Court: What would you do in the second year, if the second year you made a pot of money and the year before you lost money, you would have a loss carry forward, how would you handle that?

The Witness: In the preparation of the income tax return for the now third year, you would carry

(Testimony of Robert Hodge.)

forward this loss and offset that loss against the profit made in that year for the purposes of computing the income tax due for the third year.

The Court: So in the third year, on your operating statements, you might have made money?

The Witness: That is right.

The Court: When you got ready to file with the Federal Government you might have enough loss to absorb, cancel off that profit?

The Witness: That is right.

The Court: Now, this loss that you would carry forward or back, it or a part of it can only be used once? I mean if you use a part of that loss to carry back, then you never can use that part of the loss any more?

The Witness: No, that is right.

The Court: Or if you use a part of that loss to carry forward, supposing you use 50,000 of that loss, after you once use it it is gone? [1798]

The Witness: It is gone for this purpose.

The Court: All right.

I don't know whether that helps any.

The Witness: To make it a little clearer, assume a profit of 25,000 in your first year of operations, a loss of 100,000 in your second year, you then carry this 100,000 loss back to your first year, you absorb 25,000 of it; now you can carry 75,000 forward for the next succeeding five years. If your profits are 75,000 in your third year, then you wipe out—rather, you use up that whole carry-forward and

(Testimony of Robert Hodge.)

do not pay any tax. Then you start off your fourth year and it is on its own.

The Court: This is part of the Federal tax laws?

The Witness: That is part of the Federal tax laws.

The Court: This business of taking into account any carry-forward or carry-back, that is done after you have made your operating statement for a particular year?

The Witness: That is right.

The Court: It has nothing to do with the operating statement for the particular year in question?

The Witness: No; this carry-forward and carry-back is only for income tax computations.

The Court: All right. Go ahead.

The Witness: Wait a minute.

However, it might affect your operating statement, because [1799] the operating statement—you come down to your net profit, then you usually take off your Federal income tax due, and carry the net figure to the balance sheet. It would affect your operating statement in that way, because there may or may not be a tax due. You could conceivably have an operating statement with $100,000 profit, but no income tax due for that period, because of the carry-forward or carry—yes, carry-forward.

Am I confusing it?

The Court: All right. Go ahead, Mr. Dixon.

Q. (By Mr. Dixon): Now, Mr. Hodge, I believe you have already indicated what was meant by the term "current assets" on the balance sheet. I don't

(Testimony of Robert Hodge.)

think we discussed what is meant by "deferred charges" as an asset. Will you indicate to the jury what is meant by that term?

The Witness: I am sorry, I don't believe we discussed current assets.

The Court: You didn't ask him, Mr. Dixon.

Q. (By Mr. Dixon): Then tell the jury what is meant by the term "current assets."

A. A current asset is a quick asset, it is an asset that should be converted into cash normally in a period of, say, six months.

The Court: What are they? What do they consist of ordinarily? [1800]

The Witness: Normally, cash, accounts receivable, inventories, items of that nature.

The Court: What are fixed assets?

The Witness: Fixed assets are investments in plant, leasehold improvements, things of that nature, which will not be converted into cash, which are normally used in the operations of the business.

The Court: Go ahead.

Q. (By Mr. Dixon): Fixed assets constituted machinery, equipment, and if owned the plant of the company involved; is that correct, Mr. Hodge?

A. That is right.

Q. If the company merely leased a building, however, that would not be carried as a fixed asset, only the machinery and equipment contained in the buildings?

A. Only assets owned would be carried as a fixed asset.

(Testimony of Robert Hodge.)

Q. What is meant by "deferred charges" as an asset?

A. Deferred charges are expenditures made for future periods. In other words, if you had an insurance policy which cost $100, and half of it related to your period and half to the succeeding period, you would defer $50 of that expense to the following period.

The Court: Let's take a problem that every juror here who owns a house would know about.

You buy a fire insurance policy and it runs for three [1801] years and you pay $150 for the fire insurance policy; you could only take $50 of that for the year that you bought the policy, and the other $100 that you would pay would be deferred and could be used in those years ahead as they came along.

Is that what you mean?

The Witness: That is exactly it.

Q. (By Mr. Dixon): What is meant by the term "current liabilities"?

A. Current liabilities are items that normally would be paid in six months, such as your current trade accounts, notes payable within six months or less, taxes due within six months, any other expense items similar to that nature.

Q. Then on most balance sheets where you have a capital stock or a stock company, there is generally a capital account, is there not, called a stock account?

A. Normally in a corporation you have a capital

(Testimony of Robert Hodge.)

stock account which represents either the amount paid in for the capital stock or the par value of the stock that has been issued. It depends on the charter of the company as to how the stock has been issued and set up on the books.

Q. If there is a deficit in the operations of the company at any time during its existence, that is generally charged against the capital account, is it not, first?

A. On the balance sheet it is deducted from the capital [1802] account.

Q. I mean it is deducted.

A. If the assets exceed the earnings at that particular point. [1803]

The Clerk: This will be Plaintiff's Exhibit 60, your Honor. I will mark the copies 1 to 14, inclusive.

The Court: The original will be Exhibit 60 for identification, and the copies will be marked 1 to 14, inclusive.

(The exhibit referred to was marked Plaintiff's Exhibit No. 60 for identification.)

The Court: These are only marked now for identification. Do you want the exhibit identified before the copies are handed to the jury, or may they be handed to them and the questioning go ahead? It will save some time the latter way.

Mr. Strachan: Yes. I have no objection.

The Court: You are going to be handed, ladies and gentlemen of the jury, copies of this Exhibit

(Testimony of Robert Hodge.)

60 for identification. It is apparently an income account and a balance sheet of Winckler & Smith. It is not yet in evidence. Ordinarily it wouldn't be handed to you until it is in evidence, but it will be identified by the witness and you will have these copies before you to follow the testimony of the witness. These are to be handed back at the close of each session. They are not to be taken with you to the jury room, nor are they to be taken home with you at night. You may look at them here in the court room just as if there had been a large chart put up in front of you which the witness would point to, but it will be easier to let you each have a copy to look at. The bailiff will collect them at the end of the [1804] session.

Q. (By Mr. Dixon): Mr. Hodge, I direct your attention to what has been marked for identification as Plaintiff's Exhibit 60. Will you state to the jury what that exhibit relates to?

A. You mean the income account?

Q. The whole exhibit. It covers the income account, the heading is for the six months ended July 31, 1949, and the balance sheet showing the assets, or with the words Assets and Liabilities as of July 31, 1949.

A. I am sorry. This is for the year ended January 31, 1950, the one I have.

The Court: Well, let's have everybody look at the same sheet. Which one do you have?

Does everyone have one that says 1949 on the jury?

(Testimony of Robert Hodge.)

The Jurors: Yes.

The Witness: Well, I have my own copy here of the other one.

Mr. Dixon: I would rather you have the exhibit.

The Court: He can use mine. Don't you have an extra copy?

The Witness: I have a work sheet here.

Q. (By Mr. Dixon): Now that we are all straightened around, do you have, Mr. Hodge, what has been marked for identification Plaintiff's Exhibit 60, the same being an [1805] income account statement for the period ended July 31, 1949, and the balance sheet as of July 31, 1949?

A. I do.

The Court: Keep your voice up.

Q. (By Mr. Dixon): Now, will you state to the jury what period of time in fact this statement covered, this income account statement covered? In other words, it is my understanding it does not cover the full six-months period.

A. The actual operations did not start until June of 1949. The actual processing of juice or fruits, rather, did not start until about—I don't remember exactly the date, but it was early June. There however, are operations of the company from the termination of the Chapter 11 proceedings, a month or two before that.

Q. The point I want to determine, Mr. Hodge, is as to whether or not the Plaintiff's Exhibit 60 for identification relates to any operations under or by the receiver for the company.

(Testimony of Robert Hodge.)

A. It does not. It is the operations of Winckler & Smith Citrus Products Company only.

The Court: When did the receivership end? Some time in 1949, didn't it?

The Witness: My recollection is in April, but I am not positive. I would have to look at my papers.

The Court: So this is after the end of the receivership [1806] under the Chapter 11 proceedings.

The Witness: That's right.

Q. (By Mr. Dixon): And carried through to the period ending July 31, 1949?

A. That's right.

Q. Now, the item Sales on the income account covered the sales made by Winckler & Smith on its own operations during that period of time?

A. That's right.

Q. Following termination of the Chapter 11 proceedings.

A. Following termination of the Chapter 11 proceedings.

Q. The Cost of Sales item is as set forth therein, being $199,000 plus.

A. All of the items in here relate only to the operations of Winckler & Smith Citrus Products.

The Court: Let's save some time here.

Mr. Dixon: Yes.

The Court: This sheet, Exhibit 60 for identification, is a copy of the financial records of Winckler & Smith, as you kept them.

The Witness: As I prepared them at that date, that is true.

(Testimony of Robert Hodge.)

The Court: And the first sheet is the income account [1807] for the period you have described.

The Witness: That's right.

The Court: The second sheet is the statement of assets, and the third sheet is the statement of liabilities, and the two together are called the balance sheet.

The Witness: That's right.

The Court: And at the bottom of the second sheet, the figure $206,000 equals the liabilities shown on the third sheet, $206,000?

The Witness: That's right.

The Court: These records were kept in the regular bookkeeping practice?

The Witness: They were.

The Court: Standard method?

The Witness: Standard double-entry set of books.

The Court: So that we can start, then, with sales and subtract your cost of sales, giving you $39,000. Then you have a subtotal of your selling expenses, some $14,000, and administrative expenses of $11,000, almost $12,000, and the two of those total 26. Substracting the 26 from the 39, it gives you 13,000. You have some additional miscellaneous income, $1,000, and the final figure of 14 thousand some odd dollars is the profit from the income account for that period?

The Witness: That's right.

Q. (By Mr. Dixon): Now, directing your at-

(Testimony of Robert Hodge.)

tention to the [1808] balance sheet part of this exhibit, Mr. Hodge, particularly the assets part thereof, under Deferred Charges, there is an item Leasehold Improvements in the amount of about $9,600. Will you state to the jury what that was?

A. That represents the unamortized amount of expenditures for improving the building, which at that time Winckler & Smith were renting. They went in and spent several thousand dollars to put the building in shape to process the fruit. Normally that is written off over the period of the lease, that is, it is amortized into expenses and taken into the income account during the period of the lease, and that represents the unamortized balance of those expenditures at that time.

The Court: By amortize, you mean divide up.

The Witness: Divide up.

The Court: A certain part applied to one year and others came out over the succeeding years.

The Witness: That's right.

The Court: That is what you meant by amortize?

The Witness: That's right.

Q. (By Mr. Dixon): What is meant by the item Unabsorbed Pre-season Expenses in the amount of $18,000 plus?

A. In the citrus processing business, it is normal to spend a great deal of money to get ready for a particular fruit season, which is written off over that particular [1809] season. The normal Valencia season is from, say, June through October, and

(Testimony of Robert Hodge.)

there is quite a bit of money spent in May and June getting ready for that season, which is amortized over that particular season, and that is what that represents, that is the unamortized balance of those expenditures.

The Court: You mean, then, part of what your total pre-season expenses were have already been taken into account?

The Witness: That's right.

The Court: And this is the remaining portion that you haven't taken into account for this six-months period, but you are going to take into account for the next six months?

The Witness: During the rest of the Valencia season that would be taken into account.

Q. (By Mr. Dixon): Now, directing your attention to the liabilities part of the balance sheet, Mr. Hodge, I notice an item Notes Payable, due December 15, 1950. Will you explain to the jury what that item is?

A. I am going to have to get my papers out, because I do not remember.

The Court: Wasn't that the note to the RFC?

The Witness: No, sir.

The Court: That isn't?

The Witness: That is not the note to the RFC.

The Court: All right. [1810]

The Witness: That makes up several items. There were various loans to stockholders, due to stockholders at that time, the largest of which——

The Court: Loans from stockholders?

(Testimony of Robert Hodge.)

The Witness: Loans from stockholders. Pardon me. The largest of which was a note to Mr. Rubin for $31,500. There are several others. Do you want the details?

Q. (By Mr. Dixon): In other words, that was for money advanced to the company as loans by the stockholders? A. That is true.

Q. As of this date. A. As of that date.

The Court: What are the other ones?

The Witness: There was the note to Mr. Parvin of $13,500.

There was a note to Mr. Winckler for $6,612.34.

The Court: $6,612.34?

The Witness: Yes. There was another note to Mr. Winckler for $3,000.

The Court: That makes almost 54.

The Witness: It should make it exactly.

The Court: All right.

Q. (By Mr. Dixon): Now, directing your attention to the capital stock and deficit headings of Exhibit 60, will you state to the jury what the item of $240,000 plus under [1811] capital stock refers to?

A. That is the stated value of the stock as determined by the board of directors back in 1946. Do you want me to go into that? I am not too sure, but it has been carried forward from 1946.

Q. From previous statements of the company?

A. That's right.

Q. The deficit item dated January 31, 1949, of

(Testimony of Robert Hodge.)

224,000 plus, will you state to the jury what that item is?

A. You mean the component parts, as to how it arose?

Q. Well, just the——

A. That is the net result of operations from the inception of the company to the date. It is the accumulated results of operations to that date.

Q. Is that this carry-over loss item that you have previously described?

A. No. There are a good many more items in there than that. It is a very complex figure. There are the results of the reorganization reflected in that. There is a good many things. In other words, it is the net—not net. Let's see.

Q. Well, Mr. Hodge, there has been some testimony in this case by, I think, Mr. Winckler, to the effect that in one year the company suffered a substantial inventory loss of approximately a half million dollars. Is any part of that [1812] loss, assuming it to be one, contained in this item of $224,000?

A. All of the loss on that inventory is reflected in that $224,000.

Q. And what happened to the balance of that inventory loss of a half million dollars?

A. It was charged to surplus in previous years.

Q. During previous years? A. Yes.

Q. That was before the Chapter 11 proceedings?

A. I am not sure that all of the inventory was gone before the company went into Chapter 11, but certainly it is reflected in this figure.

(Testimony of Robert Hodge.)

The Court: Well, this capital stock and deficit could also be the equivalent of the net worth of stock?

The Witness: That is the book net value of the stock at that date.

The Court: So, in other words, you start out with a $240,000 worth of stock, subtracted from that would ordinarily be the $224,000 of deficit, but since there was a profit from the operating statement, 14,000 is subtracted from the 224, which reduced the deficit then to 210.

The Witness: That's right.

The Court: Then you take the 210 from the 240 and the $30,000 would be probably the net worth of the stock on book [1813] value.

The Witness: Yes.

The Court: As of this date.

The Witness: July 31, 1949.

Mr. Dixon: I now ask that——

The Court: Do you offer Exhibit 60 in evidence?

Mr. Dixon: Yes, 60 is offered in evidence, your Honor.

The Court: 60 received in evidence. [1814]

* * *

The Court: All right.

Let me see if I can save some time.

Mr. Witness: Exhibit 61 is three sheets; the first one is the income account for the year ending January 31st, '50, and therefore it was technically the year beginning January 31st, '49, to January

(Testimony of Robert Hodge.)

31st, '50, except that it picks up after the receivership in April of '49?

The Witness: Technically the first year starts February 1st, '49.

The Court: But this picked up after the receivership?

The Witness: That is right.

The Court: So this, then, includes the six months or the portion shown in Exhibit 60, and the next six months?

The Witness: That is right. [1815]

The Court: This is, then, the full year statement?

The Witness: Yes.

The Court: While the other was the first six months?

The Witness: That is right.

The Court: And page 2, is again, assets, page 3 is liabilities?

The Witness: That is right.

The Court: Going back to page 1, the income account for the year, then showed a profit of $121,000?

The Witness: That is true.

The Court: Figured on the same basis as the last statement?

The Witness: Yes.

The Court: Now, turning to the capital stock and deficit, you again carried over the figure for the shares of two hundred forty thousand as in the previous statement?

(Testimony of Robert Hodge.)

The Witness: That is right.

The Court: And then you took the deficit as of January 13th, '49, 224,000, is that right?

The Witness: Right.

The Court: From that you took the profit from the operating statement for the year, 121,000?

The Witness: That is right.

The Court: This being a year figure it included within it the 14,000 that you had for the first six-months' period? [1816]

The Witness: That is right.

The Court: Then you subtracted that from the deficit, and that gave you 103,000 deficit, which you subtracted, then, from the stock, and that gave you a figure of 137,000, which would be the net worth value of the stock on book value?

The Witness: That is right.

The Court: Now, these records were kept in the regular course of business?

The Witness: They were kept in the regular course of business.

The Court: And by standard bookkeeping methods?

The Witness: Standard double-entry bookkeeping methods.

The Court: Is there anything else you want to talk about, Mr. Dixon?

Mr. Dixon: Just one or two items, your Honor. Thank you very much.

Q. (By Mr. Dixon): Directing your attention to the assets side of the balance sheet, Plaintiff's

(Testimony of Robert Hodge.)

Exhibit 61, I notice an item there $1 lease and option to repurchase. There has been some testimony in this case, Mr. Hodge, with reference to an option to repurchase the plant and physical assets of Winckler & Smith under the option being contained in the lease; is that the option referred to in the balance sheet, to the best of your knowledge?

A. That is the option referred to in the balance sheet. [1817]

Q. Now, with reference to the fixed assets' part of the balance sheet, I notice machinery and equipment is carried at forty-three thousand dollars plus; would you state to the jury what the source of that item is? In other words, is that the new machinery and equipment?

A. That is the expenditure for new machinery and equipment from the termination of the Chapter XI proceedings to January 31, 1950.

Q. And that item was not contained in the previous balance sheet?

A. No. Do you mean by the previous balance——

The Court: Exhibit 60.

The Witness: 60?

Mr. Dixon: Yes. In that amount?

The Witness: No, there was no expenditures at that date for machinery and equipment. That is new expenditures by the corporation for machinery and equipment.

Q. (By Mr. Dixon): Can you state whether that item was paid for out of operating income during the period in question?

(Testimony of Robert Hodge.)

A. That is a little difficult to answer in this way: It might have been paid out of the proceeds from the borrowings from the stockholders. It would come—at this date the stockholders had been paid back, substantially, so it would have to come out of operating income, yes.

Q. In other words, by referring—— [1818]

A. I couldn't identify the particular dollars that paid for that.

Q. I understand that.

By referring back to Plaintiff's Exhibit 60, there is no item "fixed assets" on Exhibit 60, is there?

A. That is right.

Q. So that this item of fixed assets on 61 represents new expenditures or improvements, or additions, to the capital equipment listed therein during the period in question; is that a fair statement?

A. With the exception of the $9,657.83, which is listed as leasehold improvements in the July 31st, '49 balance sheet.

The Court: It was there listed as a deferred charge?

The Witness: That is right.

The Court: So on Exhibit 61 nothing appears there for leasehold improvements, you have taken that item out of there and put it up under fixed assets, and there with apparently additional items it makes the sixteen thousand?

The Witness: That is right. [1819]

Q. I believe the other items have already been

(Testimony of Robert Hodge.)

gone into, namely, the capital stock and deficit item, and you explained the reduction in that account and how and under what procedure that reduction was effected, is that correct? A. That's right.

Q. And the notes payable item in Exhibit 61 has been reduced in amount, is that correct, from 54,060?

A. From a total of about 63,000, July 31, to a total of 15,000 at January 31.

The Court: In other words, the 63,000 on Exhibit 60 you get by taking up the notes payable figure and current liabilities of 9,000 and adding it to the general notes payable of 54,000?

The Witness: That is true.

The Court: That makes 63,000.

The Witness: Yes.

The Court: And in Exhibit 61, there is only the one item, notes payable, 15,000.

The Witness: That's right.

Q. (By Mr. Dixon): So there has been a reduction during that period of from 63,000 to the 15,000 by payments of notes during that period, is that correct? A. There has been.

The Court: Was that all payments of notes, or was that the forgiveness of indebtedness that Winckler owed the [1820] corporation? We had some testimony——

The Witness: Your Honor, the indebtedness Winckler owed the corporation would have been an asset. It would not have been a notes payable.

(Testimony of Robert Hodge.)

The Court: That's right. It would be on the other side of the ledger.

The Witness: That's right.

The Court: And what he owed the corporation would have been the asset.

The Witness: That's right.

Mr. Dixon: Plaintiff's Exhibit 61 is offered in evidence.

The Court: 61 received in evidence. [1821]

* * *

Q. (By Mr. Dixon): Directing your attention first, Mr. Hodge, to the income account headed Plaintiff's Exhibit 62, under Sales, there has been some testimony in this case concerning some Florida operations. State to the jury, if you know, whether any sales made by any Florida office of Winckler & Smith are contained in this item of $708,000 plus sales less discounts and allowances.

A. There were not sales during that period from the Florida operations. The 708,000 sales figures is all California operation.

Q. In other words, that represents the sales of products [1822] processed by Winckler & Smith in its Anaheim plant in California?

A. That is true.

Q. And the income account for this period shows a profit of $10,000 plus, is that correct?

A. That is correct.

Q. Now, directing your attention to the assets side of the balance sheet, Plaintiff's Exhibit 62, I

(Testimony of Robert Hodge.)

notice under Inventories something, Pledged Under Warehouse Receipts Collateral Agreement, $65,000 plus. Will you state to the jury, if you can, what is meant by pledged under warehouse receipts collateral agreement?

A. A warehouse collateral agreement is—pardon me. A loan under a warehouse collateral agreement is secured by merchandise in a public warehouse. In other words, there is inventory items in this warehouse which are collateral for this loan.

The Court: On the assets side is $65,000 following the pledged inventory. That is the value on the books of that inventory?

The Witness: That is true.

The Court: The liability for the loan that would be against those goods is shown over on the liabilities side?

The Witness: $48,000.

The Court: Secured under warehouse receipts, $48,000? [1823]

The Witness: That is true.

The Court: So you list the goods as an asset on the inventory side and you list the loan that is due for which they are pledged as security under the liabilities account?

The Witness: That's right.

Q. (By Mr. Dixon): Now, directing your attention to the fixed assets part of the balance sheet, Plaintiff's Exhibit 62, there is an increase in the item there, is there not, to $87,000 plus as against 62,000 in the Plaintiff's Exhibit 61. Will you state

(Testimony of Robert Hodge.)

to the jury what item in your fixed assets part of the balance sheet accounted for that increase?

A. Well, with the exception of tools, they all account for that increase, that is the machinery and equipment accounts for some 17,000, the furniture and fixtures some 4,000, the leasehold improvements some 4,000.

Q. In other words, that represented additional acquisitions of machinery and equipment and the other items contained under fixed assets during this period, is that correct? A. That's right.

Q. By Winckler & Smith?

A. By Winckler & Smith. [1824]

Q. The lease and option to purchase arrangement is still carried on the assets side of the balance sheet at $1? A. That is true.

Q. Now, directing your attention to the liabilities part of Plaintiff's Exhibit 62, I notice an item, this $48,000 plus item under loans payable, "secured under warehouse receipt collateral agreements," is is that the item previously referred to as an asset, I mean in the assets part of the balance sheet?

A. That is true, that is the amount that has been advanced against the sixty-five thousand odd dollars in inventory.

Q. In other words, state, if you know, whether or not during this intervening period, Winckler & Smith had occasion to borrow money against whatever inventories they had?

A. That is evidenced by the fact that there is a loan payable on the books. They had to borrow

(Testimony of Robert Hodge.)

money or there wouldn't have been that loan there.

Q. And that was borrowed against inventories, or whatever inventories were pledged, is that correct? A. That is true.

Q. I notice an item "unsecured" under the liabilities column of 62, $25,000; can you state what that represents? It is under "loans payable," "unsecured" $25,000. [1825]

A. I believe there was an unsecured loan to the Bank of America, but just a minute and I will make sure.

That was an unsecured loan to the Bank of America.

Q. In other words, that represented a loan made by the Bank of America to Winckler & Smith in that amount; is that correct? A. That is right.

Q. During the period? A. That is right.

Q. That was unsecured?

A. That was unsecured.

Q. Directing your attention to the liabilities section, can you state to the jury what change, if any, there was in the "capital stock and deficit" account in 62 as against 61?

A. There is no change in the capital stock account. However, the deficit has been reduced from $103,000 to $92,000 by the profit for the six months.

The Court: Are you through with 62?

Mr. Dixon: Plaintiff's Exhibit 62 offered in evidence.

The Court: 62 received in evidence.

(Testimony of Robert Hodge.)

(The exhibit referred to, marked Plaintiff's Exhibit 62, was received in evidence.)

The Clerk: I have marked Plaintiff's Exhibit 63, your Honor, for identification, 14 duplicate copies.

The Court: All right, [1826]

(The exhibit referred to was marked Plaintiff's Exhibit 63 for identification.)

The Court: Mr. Witness, these reports were taken from the books of Winckler & Smith and represent the income account and balance sheet for the year ending January 31, 1951?

The Witness: They do.

The Court: And the books were kept in the regular course of business?

The Witness: The books were kept in the regular course of business.

The Court: The same procedures, computations, were made as you stated as to the previous account?

The Witness: The accounting was consistent with that of the previous period; yes.

The Court: Operating profit for the year shown as $40,000, includes within it the $10,000 in 62 for the first six months?

The Witness: That is true.

The Court: And then on the liabilities, on the "capital stock and deficit" the stock is still carried at the same amount?

The Witness: That is right.

(Testimony of Robert Hodge.)

The Court: And the deficit figure of $103,000 is picked up, the same as, from——

The Witness: Picked up from the year ended January 31, [1827] 1950.

The Court: And then the resultant figure $178,000 would represent the net worth of the stock, the book value of the stock?

The Witness: The book value of the stock.

The Court: All right.

Q. (By Mr. Dixon): Directing your attention to the item sales on Plaintiff's Exhibit 63, Mr. Hodge, in the amount of $1,715,000 plus, will you state to the jury whether that amount includes any sales from Florida operations of Winckler & Smith?

A. That includes a gross sale of approximately two hundred thirty-six dollars from Florida operations.

The Court: How much?

The Witness: $236,000, approximately.

Q. (By Mr. Dixon): Now, directing your attention to the heading "Selling expenses," Mr. Hodge, during the fiscal year ending January 31, 1951, state to the jury, if you will, whether any items contained under that heading represent, shall we say, an amortization of any promotional expenses or advertising expenses that were actually incurred and paid out by Winckler & Smith during the fiscal year ending January 31st, '51?

A. During the year ended January 31, 1951, Winckler & Smith Citrus Products expended ap-

(Testimony of Robert Hodge.)

proximately $50,000 for an [1828] advertising campaign to promote new products.

Q. What products were those that were contained in that expenditure, if you know?

A. The new products were chiefly—pardon me. I misunderstood your question.

Q. No; that's right.

A. Did you ask for the products or the amounts, the nature of the expenditure?

Q. What products, if you know?

A. Chiefly lemonade and orangeade, and citrus punch, frozen juices, they were the chief items of the new ones.

Q. Will you state to the jury why, from an accounting point of view, the entire amount of that expenditure for the promotion of these new products was not carried under the item "selling expenses" in the income account, Plaintiff's 63?

A. At that time we determined that the $50,000 expenditure would carry the program for two years, even though it had all been spent in the year ended January 31, 1951, it was determined that the program had sufficient merit to advertise the product for two years, so only half of the approximately $50,000 was charged to expense in this year. [1829]

The Court: That is the item Advertising, under selling expense, 24,000?

The Witness: Well, it is in two or three items, your Honor. It is in advertising, sales and traffic salaries and travel.

The Court: All right.

(Testimony of Robert Hodge.)

The Witness: There are three different items.

The Court: The deferred items appearing, then, under Assets, Other Assets——

The Witness: That's right.

The Court: At the bottom of page 2.

The Witness: Yes.

The Court: Where does it appear there?

The Witness: Deferred promotion expense, $24,910.66.

The Court: That is the only item it appears under?

The Witness: That is the only item it appears under in the balance sheet.

The Court: All right.

Q. (By Mr. Dixon): Now, the operating statement or income account, Plaintiff's Exhibit 63, showed a profit for the year of $40,000, plus; correct? A. That is correct.

Q. And if this item had been fully charged off during the year, there would still have been a profit; is that correct? [1830]

A. That is correct. There would have been a profit of approximately $15,000.

Q. Now, directing your attention to the assets part of the balance sheet of Plaintiff's Exhibit 63, I notice an item of $104,000 plus marked Advances by Finance Company. Will you explain to the jury what that item represents?

A. As goods were sold, the invoices were forwarded to a finance company who advanced Winckler & Smith Citrus Products money against these

(Testimony of Robert Hodge.)

billings to their customers. When the amounts were collected, they were remitted directly to the finance company in repayment of these advances.

Q. Can you tell the jury, Mr. Hodge, approximately what the expenses or cost of these financing operations were to Winckler & Smith?

A. In this particular year?

Q. Well, yes, let's takes this particular item or year.

The Court: Before you go into that, let's clear this one matter up. Under assets there is a total there on page 2, current assets, total under accounts receivable, 121,000. Then there is deducted the advances of 104,000, and there is carried over as an asset 16,000, the difference.

The Witness: Yes, sir.

The Court: Now, therefore, since you have subtracted the 104,000 advanced, you have not shown it as a liability under current liabilities; is that [1831] correct?

The Witness: That is true.

The Court: But it could have——

The Witness: It could have been shown as an asset of 121,000 on the assets side, and the current liabilities of 104,000 would be on the other side.

The Court: But since you took it off here, actually the assets you are carrying forward is the differential of 16,000?

The Witness: That is correct.

The Court: You therefore don't show any liabilities for the finance company advances?

(Testimony of Robert Hodge.)

The Witness: That is done because the money collected from customers does not come to the company. It goes direct to the financing company. There wouldn't be anything wrong with showing it the other way. It was just my method of showing it at that time.

The Court: All right, Mr. Dixon.

Mr. Dixon: I believe, Mr. Reporter, I had a question pending.

(Record read.)

The Witness: The financing for the accounts receivable cost the company in the year ended January 31, 1951, $15,412.59.

Mr. Strachan: Mr. Reporter, may I have that, please?

(Record read.)

The Witness: The difference between the finance charges shown on the statement of some 16,000 and the 15,000 figure I [1832] just gave you is represented by interest on notes payable of some 900 odd dollars.

Q. (By Mr. Dixon): Is that what is referred to as factoring of accounts?

A. That is normally called factoring of accounts receivable.

Q. Is that customary, to your knowledge and experience, in companies of this character where the products manufactured are generally seasonal in nature?

(Testimony of Robert Hodge.)

A. I am not familiar with the accounting of any other processor.

Q. All right.

A. Citrus fruit processor.

Q. Now, directing your attention to the fixed assets part of this balance sheet, I notice there is an increase in machinery and equipment from approximately 60,000 plus to 70,000 plus. Does that represent the acquisition of any further new equipment by Winckler & Smith during the fiscal year?

A. That represents the expenditures by Winckler & Smith Citrus Products Company for fixed assets during the fiscal year ended January 31, 1951.

Q. I notice that the lease and option to purchase is still carried on the balance sheet at $1.00.

A. That is true. [1833]

Q. I am not sure we have referred to the unabsorbed preseason expenses carried as an asset of $22,000 plus. Will you state to the jury what that is?

A. That represents the expenditures which would normally be amortized over the full season. The season at this time for navels had just started and the company had expended this amount which had not been expense because the season had not been completed at that time.

Q. I believe you already testified that half of this promotional expense for new products is carried as a deferred promotional expense in the amount of 24,000 plus.

A. That is true.

(Testimony of Robert Hodge.)

Q. As an asset?

A. That has been carried forward.

Q. Now, directing your attention to the liabilities part of the Plaintiff's Exhibit 63, I notice loans payable, secured, $10,000. Is that secured through the finance company for factoring of these accounts that we have referred to previously?

A. No. This is secured under warehouse collateral.

Q. I mean what is that for, can you tell the jury what that loan payable item is and what it represents? A. The $10,000 item?

Q. Yes.

A. The $10,000 item is an advance made by a finance [1834] company which is secured by a collateral agreement on inventories which are stored in public warehouses. It is merely a security of that $10,000 loan. That's all it represents.

Q. I notice an item of $41,000 plus in the unsecured loans payable account. Will you tell the jury, if you can, to whom that amount was owed by Winckler & Smith?

A. There was an unsecured loan of $25,000 to the Bank of America. The balance was an unsecured balance by the company that did the factoring for the company, Merchants Acceptance Company.

The Court: The balance would be what?

The Witness: The balance was $16,190.42.

Q. (By Mr. Dixon): That item, Unsecured Loans Payable, represents the amounts due the Bank of America, an unsecured loan?

(Testimony of Robert Hodge.)

A. That is correct.

Q. And the Merchants Acceptance Corporation on an unsecured loan? A. That is true.

Q. Now, coming to the capital stock and deficit account, will you state to the jury whether there was any increase in the value of the net worth of the corporation as reflected by this item of your statement over the balance sheet for the previous fiscal year ended January 31, 1950?

A. At January 31, 1950, the book value of the stock [1835] was $137,204.87, and January 31, 1951, it was $178,050.40.

The Court: Shouldn't this date be different on the last page there? You say deficit January 31—that should be 1950, should it not?

The Witness: Yes, sir.

Mr. Strachan: Then may we all change those on the face, your Honor?

The Court: Will everybody change that? Do you see what we are looking at on Exhibit 63? That is the last page down there, where it says "Deficit." The first date is January 31, 1951. That should be 1950. The second date is correct, 1950, where it appears the second time, but the first date should be 1950.

Mr. Dixon: Thank you, your Honor.

The Court: We will check the reports later to see that that has been corrected. In other words, that deficit was carried over from the end of the previous year.

The Witness: That's right. [1836]

(Testimony of Robert Hodge.)

Mr. Dixon: Plaintiff's Exhibit 63 offered in evidence, your Honor. [1837]

* * *

The Court: All right. Mark the exhibit for identification as 63-A, Mr. Dixon, which will be the notes. They will be marked for identification, and we will have them available if they become material.

Is that satisfactory to everbody?

Mr. Dixon: That is agreeable to me; yes.

Mr. Strachan: That suits me.

As I understand it, your Honor, the document that has been handed by Mr. Dixon to the clerk consists of a complete financial statement prepared by Mr. Hodge's firm, and it contains as exhibits the income account and balance sheet that have been referred to.

Is that correct?

The Witness: That is true. [1838]

Mr. Dixon: That are already in evidence; yes.

Mr. Strachan: And then there is a covering letter, which I suppose are the notes that you refer to?

The Witness: They are the notes.

Mr. Strachan: So my suggestion would be that the complete document be marked 63-A.

The Court: Correct.

You say it contains a financial statement. Which one is it?

Mr. Dixon: The same one. It contains all of 63.

The Court: All of them, or just 63?

The Witness: Just 63.

(Testimony of Robert Hodge.)

Mr. Dixon: Just 63.

The Court: Then 63-A will be the identification number for this document.

(The exhibit referred to was marked Plaintiff's Exhibit 63-A for identification.)

Mr. Strachan: Were there like notes qualifying any of the other balance sheets and income accounts that have been marked, Mr. Hodge?

The Witness: No. These notes referred simply to this particular audit.

Mr. Strachan: I was talking about your Exhibit 60, which was for six months ended July of '49——

The Witness: I am sorry. I misunderstood your question. [1839]

Yes; there were notes at every one of these examinations. There just wasn't the annotation—pardon me, I don't know whether that is the right word—anyway, this qualification was not put on the statement until this year.

The Court: What you mean by that is on the bottom of 63, which is a copy of this financial report that you rendered, there was typed on it "subject to notes," and so forth?

The Witness: That is right.

The Court: And that is why that appears on 63?

The Witness: That is right.

The Court: When you submitted 62 and 61 and 60, on the financial statement there was not typed on the bottom that reference to notes?

The Witness: That is right.

(Testimony of Robert Hodge.)

The Court: But there were notes actually——

The Witness: There were notes.

The Court: ——for 60, 61 and 62?

The Witness: Yes; there were.

The Court: You were just making a true copy by putting the word "notes" on 63?

The Witness: There was a reason for it. We wished to call attention to the appraisal that had been made during the course of this audit. [1840]

* * *

The Court: Well, first, we didn't finish up with 63. Is it offered in evidence?

Mr. Dixon: Yes, your Honor.

The Court: 63 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 63.)

The Court: Now, 64 has been marked for identification.

The Clerk: Yes, your Honor; with 14 duplicate copies.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 64 for identification.)

The Clerk: Shall I pass these out to the jury, your Honor?

The Court: Yes.

ROBERT HODGE

the witness on the stand at the time of recess, having been previously duly sworn, was examined and testified further as follows:

The Court: Mr. Witness, 64 is a copy of the financial report rendered for Winckler & [1842] Smith?

The Witness: It is, your Honor.

The Court: The books were kept in the ordinary course of business?

The Witness: Books in the ordinary course of business; yes, sir.

The Court: Standard accounting practices?

The Witness: Yes, sir.

The Court: Same situation? This is another six months report?

The Witness: Yes, sir.

The Court: Page 1 is the income account, pages 2 and 3 are the assets and liabilities?

The Witness: Yes, sir.

The Court: All right, Mr. Dixon.

Direct Examination
(Resumed)

By Mr. Dixon:

Q. Mr. Hodge, first directing your attention to the item Sales on the income account, Plaintiff's Exhibit 64, I believe the volume of sales contained therein was $367,000 plus for the six months period ending July 31, 1951, is that correct?

A. That is correct.

(Testimony of Robert Hodge.)

Q. Will you state to the jury whether that figure includes any sales on any of the Florida operations of Winckler [1843] & Smith?

A. It does. It includes 156,000 odd dollars in sales of Florida operations.

Mr. Strachan: What was the figure, please?

The Witness: 156,000, approximately.

Q. (By Mr. Dixon): And the balance of approximately 210,000 represents the sales on products processed by Winckler & Smith during that period and sold; is that correct?

A. In California; yes, sir.

Q. You don't mean sold in California?

A. No. I mean processed in California.

Q. By the Winckler & Smith plant at Anaheim.

A. Yes, sir.

Q. The previous figure of the Plaintiff's exhibit for sales which did not include any Florida sales was what amount, Mr. Hodge?

A. You mean for the year ended——

Q. No; for the six months period ending July 31, 1950, Exhibit 62.

A. 708,000.

Q. And that did not include any Florida sales; is that correct? A. That did not. [1844]

Q. Will you tell the jury what the difference is, then, in sales of products processed at the Winckler & Smith plant and sold during the period ending in Exhibit 64 as against the amount processed and sold during the period set forth in Plaintiff's Exhibit 62?

(Testimony of Robert Hodge.)

A. In Exhibit 62 the sales from the Anaheim processing plant operations were $708,000 odd, in the six months ending July 31, 1951, the sales from the Anaheim processing operations were approximately $210,000, a difference of $498,000.

Q. I notice in the Cost of Sales item that you have a figure of $41,000 in brackets; will you explain to the jury what that figure represents?

A. That is the excess of the cost to manufacture the goods over the net amount of sales for the same goods.

The Court: If you were using red and blue ink, that would be a red-ink figure?

The Witness: That would be a red-ink figure.

The Court: It is just that you can't use red ink so you put it in brackets?

The Witness: That is true.

The Court: All right.

Q. (By Mr. Dixon): Directing your attention next to the selling expenses item, you have previously referred in your testimony to an item of some $24,000, which was carried over as a deferred promotional expense in Plaintiff's Exhibit [1845] 63; is that item reflected in any of the items under Selling Expenses in Plaintiff's Exhibit 64?

A. Yes, sir; that $24,000 odd has been charged to selling expenses in the six months ended July 31, 1951.

Q. And is included in what item set forth in Exhibit 64?

(Testimony of Robert Hodge.)

A. It is included in the sales salaries, the advertising and the travel.

Q. And the total amount of $63,000 plus under selling expenses, then, includes that $24,910.66 item carried as a deferred promotional expense asset in Plaintiff's Exhibit 63; is that correct?

A. It does.

Q. Directing your attention to the item $152,000 plus in brackets, will you state to the jury what that is on the income account, Plaintiff's Exhibit 64?

A. That is the net loss from operations during the six months ended July 31, 1951.

Q. Mr. Hodge, based upon your knowledge of the operations of the business of Winckler & Smith, do you have any opinion as to the reason for this loss of $152,000 based upon the operating statement, Plaintiff's Exhibit 64, that you have just discussed?

Mr. Strachan: I will object. I don't think a foundation for his opinion as to the reason for loss has been laid. [1846]

The Court: The question was asked whether he has an opinion based upon the records, the document. Is that the question?

Mr. Dixon: Correct, your Honor.

The Court: The objection is——

Mr. Strachan: Based upon his knowledge of the business. Knowledge of the business, other than what he found in the books, hasn't been disclosed.

The Court: Let's rephrase the question. The objection is sustained. [1847]

Q. (By Mr. Dixon): Based upon the knowledge

(Testimony of Robert Hodge.)

of the operations of Winckler & Smith as determined from the books of that company from which this income account, Plaintiff's Exhibit 64, was prepared and taken, Mr. Hodge, do you have any opinion as to the reason for the $152,000 plus loss for the operating period?

A. Well, the records clearly indicate——

Q. You can answer that yes or no.

A. Yes.

Q. Will you state what that opinion is?

A. The reason is very obvious. There is a decrease of approximately $500,000 worth of sales in the California operations as compared to the same period in the year previous.

Q. What is the comparison—withdraw that.

A. Do you want me to finish?

Q. Yes. I thought you had finished.

A. In the meanwhile the overhead continues on and you do not have any way of absorbing your overhead. I mean you keep your plant open. You have maintenance labor, you have certain salaries that must be paid in order to keep the plant open, and they all continue on and you have no way of absorbing them. So your loss keeps mounting until it gets to some tremendous figure, such as this one.

Q. Directing your attention, Mr. Hodge, to the assets [1848] part of the balance sheet for this period, Plaintiff's Exhibit 64, is there any new item contained therein under fixed assets that was not contained in Plaintiff's Exhibit 63?

A. Yes; there is a very large change. The plant

(Testimony of Robert Hodge.)

has been reacquired under the option that the company formerly held to repurchase it, and the plant was appraised and the appraised value was set up in the books some time prior to the date of this balance sheet.

Q. Referring back for a moment to 63, Plaintiff's Exhibit 63, I believe under fixed assets there, the total amount under that description, after providing for depreciation and amortization, was $91,000 plus, whereas the amount now contained in Plaintiff's Exhibit 64 is $721,000 plus. Will you—well, withdraw that.

Now, directing your attention to the liabilities part of Plaintiff's Exhibit 64, can you explain to the jury what this item of 721,000—on the assets side of the balance sheet, and where, if there is any corresponding liabilities provision, that is contained in the liabilities part of the balance sheet of Plaintiff's Exhibit 64?

A. Directly the capital surplus of some 243,000 arose principally from this setting up the assets at an appraised value, and the part of the capital stock issued was issued in payment of the plant, some $150,000—well, that is not quite [1849] right.

Q. I'm sorry. Have you finished?

A. Just a minute. The company issued $150,000 of its preferred—no; it didn't, either. The company issued 26,535 shares of its preferred stock plus $17,325 in cash, and assumed an unpaid balance on the mortgage of $50,499.04, to reacquire these assets,

(Testimony of Robert Hodge.)

so those amounts are all reflected in the liabilities side of the July 31, 1951, balance sheet.

Q. Directing your attention back to 63 and the assets side of the balance sheet for that period ending January 31, 1951, I believe there is an item of Lease and Option to Purchase carried as an asset of $1.00; is that correct? A. True.

Q. That item does not appear on the assets side of the balance sheet for the period ending July 31, 1951, Plaintiff's Exhibit 64, does it?

A. It does not.

Q. Will you state to the jury why that item does not appear on the assets side of the balance sheet for this period, Plaintiff's Exhibit 64?

A. On April 16, 1951, the company exercised this option so that the option no longer was in existence, and that is why it does not appear on the balance sheet of July 31, 1951. [1850]

Q. There is set up, then, on the liabilities side of the balance sheet, Plaintiff's Exhibit 64, this preferred stock which did not appear, did it, in the Plaintiff's Exhibit 63? A. It did not.

Q. And also an increase in the common stock item on the liabilities side of Plaintiff's Exhibit 64, which was not on Plaintiff's Exhibit 63, the liabilities side; is that correct? A. That is true.

Q. Can you state to the jury briefly whether any additional stock had been issued by Winckler & Smith during this period from the statement, Plaintiff's Exhibit 63, for the period ending January 31,

(Testimony of Robert Hodge.)

1951, and the period ending July 31, 1951, Plaintif's Exhibit 64?

A. You are speaking of common stock or the preferred?

Q. Both.

A. The common stock, the company was issued 315,110 shares of its $1.00 par value common stock in exchange for the 1,000 shares no par value common stock which was carried in the balance sheet of January 31, 1951. It did issue 32,995 shares of preferred stock during the six months ended July 31, 1951. [1851]

Q. I hand you Plaintiff's Exhibit 39, the same being a prospectus and permit of the Department of Investment, Division of Corporations of the State of California, in the matter of the application of Winckler & Smith, whereby Winckler & Smith was authorized to issue some additional stock; can you state to the jury whether the stock that you have just referred to as being the preferred stock and some of the common stock carried in the capital stock and surplus account, under the liabilities section of Plaintiff's Exhibit 64, represents some of the stock issued pursuant to the permit I have just mentioned?

A. Pardon me a moment.

I am not certain that the common stock and the preferred stock were authorized to be issued under the same permit. The permit covering the sale of the preferred stock is certainly——

Q. In any event——

(Testimony of Robert Hodge.)

A. There may have been two permits I don't remember, and I can't quite gather from my notes whether there were.

Q. Now, I notice the item capital surplus down there of $343,000 plus, on the liabilities part of Plaintiff's 64; did that item appear in the previous balance sheet or in the comparable amount Plaintiff's Exhibit 63? A. It did not.

Q. Will you explain to the jury how this item appears [1852] in this statement and how it happens to be there, if it didn't appear in the previous statement, Plaintiff's Exhibit 63?

A. Well, the capital surplus arose chiefly from putting the fixed assets on the books at an appraised value.

Q. Is that the appraisal, if you recall, made by the Union Appraisal Company in 1950 and '51?

A. This was based on the appraisal made as of January 12, 1951, by the Union Appraisal Company. I believe there was a previous appraisal which was referred to in this appraisal.

Q. The appraisal that you are referring to, Mr. Hodge, is Plaintiff's Exhibit 51, is it?

I am handing you Plaintiff's Exhibit 51 and will ask you to examine the same and then answer the question if you can.

A. Yes, sir; it is.

Q. Now, Mr. Hodge, directing your attention to the item under the liabilities part of 64, "Unsecured loans payable," an item of some $30,000 plus, would

(Testimony of Robert Hodge.)

you state to the jury to whom that amount was owing or owed to by Winckler & Smith?

A. $25,000 was an unsecured loan payable to the Bank of America.

Q. Is that the loan you previously referred to or discussed, I believe, in Exhibit 63?

A. It was a renewal thereof; yes. The balance was—$2125.02 was due to the Fiberboard Products on an unsecured note, and $2,892.28 was due to the Lehman Printing Company [1853] on two unsecured notes.

Q. Now, I also notice an item that appears for the first time in the liabilities in any of the balance sheets we have previously referred to, namely, a mortgage which has been secured by a lien on fixed assets, $50,000 plus. Will you state to the jury what that item is and to whom it was owed?

A. That item represents the unpaid balance on the RFC mortgage which was assumed at the time the company exercised its option to repurchase the plant.

Q. Can you state to the jury why that is carried as an account under the current liabilities of Winckler & Smith?

A. The loan matured on February 1, 1952, which is less than a year, and customary accounting practice requires any liability maturing in less than a year to be classified as a current liability.

Q. Now, state to the jury, if you will, Mr. Hodge, whether there is any increase in the operating deficit of Winckler & Smith as appears from the liabilities

(Testimony of Robert Hodge.)

section of Plaintiff's Exhibit 64 as compared with the liabilities section of Plaintiff's Exhibit 63?

A. In my report there was another statement which you do not have in this exhibit called Operating Deficit. It was the statement of the operating deficit. Do you wish me to read that? [1854]

Q. Yes. I am asking you to explain the increase in——

Mr. Strachan: Before the document is read, which hasn't been identified, I would like to see what it is, your Honor.

The Court: Yes; you may. I take it you have had all these reports, but you want to refresh your recollection on which one he was referring to?

Mr. Strachan: I don't think we have ever seen this particular one.

The Witness: This page is not in the exhibit, your Honor, of the report.

Mr. Strachan: I should think it should go in, but I think it should go in as a documentary exhibit so it could be interpreted in relation to the others.

Mr. Dixon: I have no objection to it going in, your Honor, but if this witness can explain it, I don't think it is necessary to further encumber the record, but if counsel wants it in we can put it in.

The Court: If you ask the witness to read from it, we will put it in. If the witness answers the question without reading, then anybody can put it in that wants to. It will be marked, however. We will mark it 64-A for identification. Are you going to

(Testimony of Robert Hodge.)

read from it or do you want to give an explanation without reading from it?

The Witness: I will do anything that is wanted, either [1855] way. I am not familiar with the processes of law.

Q. (By Mr. Dixon): Can you answer the question?

A. I can answer it briefly without referring to this.

Q. All right.

A. We started out with, say, a $62,000 deficit. There was a slight transfer of some $70,000 of this deficit to the capital surplus for items that had been in the operating deficit before, but which were now transferred over to the capital surplus item, and the difference of some $140,000 arose from the loss during the period, $148,000 loss during the period, which brought the deficit from 62,000 to [1856] 201,000.

* * *

The Court: 64 received in evidence. [1857]

* * *

The Court: Mr. Witness, Exhibit 65 is a copy of the report made by you?

The Witness: I don't have a copy yet.

The Court: Do you have one for the witness?

(Document handed to the witness.)

The Court: This is a copy of the report made by you to the company?

The Witness: It is not a complete copy in that it doesn't have the summary of the operating deficit.

(Testimony of Robert Hodge.)

The Court: It is a copy of the income account and the assets and liabilities?

The Witness: It is.

The Court: Kept in the regular course of business?

The Witness: Kept in the regular course of business.

The Court: Go ahead, Mr. Dixon.

Q. (By Mr. Dixon): Directing your attention, Mr. Hodge, to the amount or the item, Sales, on Plaintiff's 65 for the year ending January 31, 1952, in the amount of $670,000 plus, will you state to the jury whether that includes any sales on the Florida operations during that year ending January 31st, '52? A. It does.

Q. Can you tell the jury what the approximate amount of those sales were?

A. It includes $156,000 plus worth of sales [1858] from Florida operations.

Q. Based upon those figures for Florida sales, what were the total sales of Winckler & Smith for the fiscal year ending January 31st, '52, on products processed by it during that fiscal year at its Anaheim plant, and sold?

A. I have a figure here of 14,000 odd for sales allowances, which I cannot readily segregate between California and Florida. Ignoring that, there was $528,735.91 of sales from the California operations.

Q. By referring to Plaintiff's 63, and the operating statement therein, particularly the sales item on

(Testimony of Robert Hodge.)

the income account for that fiscal year ending January 31st, 1951, can you state to the jury what the difference is in dollar volume of sales, as indicated by Plaintiff's Exhibit 65 for the year ending January 31, 1952, and Plaintiff's Exhibit 63 for the fiscal year ending January 31, 1951, with reference to those products processed and sold at the Winckler & Smith Anaheim plant here in California?

That is a long question.

A. The sales from the Anaheim plant processing in the year ended January 31, 1952, were substantially one million dollars less than they were in the previous year.

Q. Now, directing your attention to the item, Selling Expenses, on Plaintiff's 65, you have previously referred to a deferred asset carry-over from the previous year for [1859] sales promotion of special products or new products of Winckler & Smith; is that item reflected in any way in the selling expenses item on Plaintiff's 65?

A. It is.

Q. Where is that item referred to or included, Mr. Hodge?

A. That item is included in the sales, advertising and travel expenses for the year ended January 31, 1592.

The Court: By that you mean it doesn't make up the total of those items as shown, but it is part of those items?

The Witness: It is part of those three items.

(Testimony of Robert Hodge.)

The Court: What it is, about a $24,000 figure?

The Witness: Practically a $25,000 figure.

The Court: And makes up part——

The Witness: Part of these three figures.

The Court: Shown on 65?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Dixon): Under administrative expenses, Mr. Hodge, I notice one item of 13,000 plus for professional fees; will you state to the jury what that item includes?

A. Yes. That is the expense for the year for legal and accounting fees, primarily.

Q. Going back to the sales item, I notice there is a figure in brackets of $10,000 plus under the income statement 65; will you state what that figure represents? [1860]

A. I am sorry. I didn't catch the first part of your question.

The Court: The figure in brackets between Sales and Cost of Sales.

The Witness: The amount of $10,144.46 represents the excess of the cost of manufacturing and packaging the sales that were made to customers in the year ended January 31, 1952.

Q. (By Mr. Dixon): And the income account on Plaintiff's 65 indicates what, with reference to the profit or loss of operations by Winckler & Smith during the fiscal year ending January 31, 1952?

A. The income account for the year ended January 31, 1952, shows a loss for the period of $184,523.20.

(Testimony of Robert Hodge.)

Q. Now, based upon your knowledge of the books and items reflected therein, and from which this statement, Plaintiff's Exhibit 65, an income account statement showing such loss of $184,000 plus was prepared, do you have an opinion, Mr. Hodge, as to the reason for that loss?

Mr. Strachan: I make the same objection that I made to the similar question that was asked with respect to Exhibit 64, on the same ground.

The Court: Overruled. It is limited to the financial records.

You may answer yes or no, do you have an opinion?

The Witness: Yes, sir; I have an opinion. [1861]

Q. (By Mr. Dixon): Will you state to the jury what that opinion is?

A. The reason is that there is a million dollars in less sales in the California operations in the year ended January 31, 1952, over the previous year. Without sales, your plant keeps on going. You have operating expenses to pay. Even if you don't produce any fruit at all, you have operating expenses to pay, and it just gets to some very large figures if you don't have the sales to absorb these overhead items.

Q. Now, directing your attention to the liabilities part of the balance sheet, Plaintiff's Exhibit 65, Mr. Hodge, I notice that there is a new item which appears, apparently for the first time, on the liabilities side of the balance sheet in the amount of $57,000 plus.

(Testimony of Robert Hodge.)

The Court: Under notes payable secured by second trust deed on fixed assets is that what you are referring to?

Mr. Dixon: Yes, your Honor.

Q. Will you explain to the jury what that item represents?

A. That item represents the amount owed on funds that were raised which were secured by a lien, a second lien on the fixed assets of the company.

The Court: Who was that loan from, do you know?

The Witness: That was from Mr. Parvin, one of the [1862] stockholders.

Q. (By Mr. Dixon): I am not sure that the jury heard your answer. Will you tell the jury who Mr. Parvin was?

A. Mr. Parvin was one of the stockholders.

Q. And the second trust deed referred to under the liabilities section of 65, will you explain to the jury what relation that bore to the first trust deed, so-called, to the RFC in the amount of $50,000 plus, which also appears on Plaintiff's Exhibit 65 in the liabilities part thereof? A. Well, any——

The Court: Keep your voice up.

The Witness: Any second trust deed is secondary to the first trust deed in that if the property were sold and there were insufficient proceeds to satisfy the holder of the first trust deed, the second trust deed holder would realize nothing on his loan on the property.

(Testimony of Robert Hodge.)

The Court: Well, was that second on the land and buildings, for one thing?

The Witness: Yes. It was on all fixed assets.

The Court: Was it on the same fixed assets that the RFC first trust deed was on?

The Witness: Yes; it was.

Mr. Dixon: I offer 65 in evidence, your Honor.

The Court: 65 received in evidence. [1863]

* * *

Q. (By Mr. Dixon): Mr. Hodge, have you examined at my request the agreement between Silzle and Exchange Orange dated September 10, 1951, Plaintiff's Exhibit 25? A. I have.

Q. And you are familiar with the various figures and items contained therein with reference to certain prices and other allowances referred to in said contract? A. I am.

Q. Have you also examined certain statistical information and other data contained in Plaintiff's Exhibit 11 covering the amounts of oranges delivered under this contract to Silzle, the amounts processed, the gallonage of single-strength juice processed, the total cases of single-strength juice processed, the amount in actual dollars paid—Silzle paid Exchange Orange for fruit supplied and processed, the amounts allowed for manufacturing costs to Silzle, the amounts made available to Silzle under label allowances under the contract, and computed the amounts allowed for various other items referred to on Plaintiff's Exhibit 66—have you done that, Mr. Hodge? A. I am, and I have.

Q. By referring to Plaintiff's 66 and considering

(Testimony of Robert Hodge.)

those items referred to therein as contained in Plaintiff's Exhibit 11, and the other items and provisions of Plaintiff's Exhibit [1866] 25, Plaintiff's Exhibit 25 being the Silzle-Exchange Orange contract before referred to, can you state to the jury the actual amount per ton paid by Silzle to Exchange Orange or Sunkist for the total number of cases processed of single-strength juice—processed by Silzle—from the tons of Valencia oranges delivered to Silzle by Exchange Orange under that contract?

A. Do you want to read that back to me?

Mr. Strachan: Your Honor, it seems to me that he is calling for a conclusion.

The Court: You are making it unduly complicated. And, secondly, you didn't mention the fact that the witness, as I read the exhibits, is also taking into account oral testimony of Finley. It seems to me that all you need do is to lay a foundation and allow cross-examination on the balance of it.

Wouldn't that be satisfactory?

Mr. Strachan: Whether it would or not, I rather expected when I first saw this, that he would take it step by step through this.

It may be clear to some what he has done, but it wasn't entirely clear to me.

The Court: Well, Mr. Witness, by Exhibit 66 for identification were you trying to make a calculation, shown as the very last item on the exhibit, page 3, namely, what in your opinion, based upon the factors that you have available, was [1867] the amount

(Testimony of Robert Hodge.)

actually paid by Silzle per ton for the oranges it got under the contract and processed?

The Witness: Yes, sir.

The Court: That is what you are trying to do?

The Witness: Yes, sir.

The Court: And the last figure $12.59 a ton was the figure you arrived at?

The Witness: That is the amount paid for fruit.

Now, there is another figure at the bottom of page 2, which also has to be taken into consideration, because that is the amount per ton Sunkist obtained for oil and peel. So the sum of the two figures, $12.59 a ton, plus $3.76 a ton, would be the total amount that Sunkist or Exchange Orange Products received for the fruit from Silzle under this contract.

The Court: That is what Sunkist received?

The Witness: Yes.

The Court: What is the figure that Silzle paid? Is it the $12.59, or is it the total of the two figures?

The Witness: Well, they paid them so much for the fruit, and they also gave them the peel and oil, so you have to take the two together to say what was actually paid for the fruit itself. In other words, they paid so much in cash and then also turned the oil and peel over under the contract.

The Court: Do we understand the same thing? Two things [1868] are being asked. One, what Sunkist got for their oranges that went to Silzle under the processing contract. They got the total of——

(Testimony of Robert Hodge.)

The Witness: $12.59 in cash, plus the oil and the peel.

The Court: $3.76?

The Witness: Which I have valued at $3.76.

The Court: Is that the same figure that Silzle, according to your computations, paid for the oranges—that Silzle was out of pocket for the oranges?

The Witness: That is the figure, according to my computations, Silzle would have paid for the fruit under the contract.

The Court: In making 66, are all the items that you have in there based upon some part of the record of this case, either an exhibit that has been received in evidence, or the testimony of a witness that appears in the transcript as written up?

The Witness: I have not seen any of the testimony, your Honor. This is based on these two exhibits, Exhibit 25 and Exhibit 11. [1869]

The Court: Well, you have a reference to Finley's testimony?

The Witness: Well, that is merely a note that was put in there.

The Court: You have been informed——

The Witness: I have been informed.

The Court: ——that Finley so testified in the transcript.

The Witness: That's right, but I didn't——

The Court: But you didn't read it yourself?

The Witness: That's right.

The Court: I don't think it makes a lot of differ-

(Testimony of Robert Hodge.)

ence who does it, but certainly this jury is entitled to have somebody go through this and explain how this was done step by step. It can be done either on direct or it can be done on cross. I don't care who does it, but somebody will have to do it, or the court will, before we get through.

Mr. Strachan: I would rather have the court or Mr. Dixon do it, because I think Mr. Dixon was in on the planning of the thing and he is probably in better position than I am.

The Court: Do you want to go through this, Mr. Dixon?

Mr. Dixon: I think in the interest of time, your Honor, the court can do it, if you care to do so. I can ask questions and am glad to do so, except obviously I would have——

Mr. Strachan: It seems to me you could just ask the witness [1870] to tell us what he did.

The Court: Let's follow along rather rapidly and see if we can get to some point. Start on the first page.

Item 1, Net Tons of Valencia Oranges Processed by Silzle. That figure is quoted from Exhibit 11.

The Witness: From Exhibit 11, that's right, sir.

The Court: Then in gallons, that comes from subdivision "f" of Exhibit 11.

The Witness: That's right, sir.

The Court: And cases, converting it to cases. comes from subdivision "b"?

The Witness: Yes, sir.

(Testimony of Robert Hodge.)

The Court: So those three figures mean the same thing, stated different ways.

The Witness: That's right.

The Court: Stated in tons, in gallons and cases.

The Witness: That's right.

The Court: Now, then, the next is dollars Silzle paid to seller, Exchange Orange, for the fruit. That comes from subdivision "g"?

The Witness: Yes, sir.

The Court: Now, 5 is the manufacturing cost specified in this Silzle agreement at the rate set forth therein. This 5 is the amount under the contract that Silzle was paid for processing these oranges? [1871]

The Witness: Yes, sir.

The Court: I think to understand this you have to remember, ladies and gentlemen, that the Silzle contract first provided that Silzle would process these oranges for—was it Exchange Orange or Sunkist?

Mr. Fisher: Exchange Orange.

The Court: Exchange Orange, at a certain cost plus some reasonable profit. Title to the oranges and title to the cases of goods, of canned juice, remained in Exchange Orange. The agreement also had a provision whereby Silzle could then buy the cases from Exchange Orange at a certain figure.

And then I take it, Mr. Witness, that 5 is your computation as to the total allowance to Silzle for processing these goods?

The Witness: Yes, sir.

The Court: Well, 6, then, is the total, I take it?

(Testimony of Robert Hodge.)

The Witness: Is the total, that's right.

The Court: The total of 4 and 5?

The Witness: That's right.

The Court: Then in 7 you computed the various allowances, label, advertising, and the trucking?

The Witness: Yes, sir.

The Court: And arrived at a $26,000 figure?

The Witness: Yes, sir. [1872]

The Court: Now, over on the next page, you then have added together what came out of 4, 5 and 7. 6 is merely a total of 4 and 5.

The Witness: Yes, sir.

The Court: So you took the items from 4, 5 and 7, and added them together to make this total of $333,000?

The Witness: Yes, sir.

The Court: Why did you add them together?

The Witness: Because we knew that item, we knew that that item was 87½ per cent of the total sales price for the canned juices. Silzle was to be allowed 12½ per cent for sales, brokerage and profit. So we knew that the $333,000 represented 87½ per cent of the sales prices of the juices.

The Court: Well, so, therefore, you figured that is still part of 8 down there where it says Total Sales Price for Canned Juices is the 380,000?

The Witness: Yes, sir.

The Court: And the figure above it of 333,000 is the total sales price less the 12½ per cent.

The Witness: That is the amount of allowances, the amount of processing costs and the amount to

(Testimony of Robert Hodge.)

be paid under item 4, which we took from the agreement. We knew those figures and we knew that figure represented 87½ per cent of the total sales price, so from that figure we make the [1873] computation and arrive at the total sales price of some $380,000.

The Court: The 12½ per cent is item 9, which equals 47,000?

The Witness: Yes.

The Court: If you added the 333 to the 47, you would get 380?

The Witness: That's right, sir.

The Court: Then in 10 you computed oil and peel produced by Silzle from these oranges?

The Witness: Right.

The Court: This oil and peel belonged to Sunkist, is that right?

The Witness: Yes, sir.

The Court: Then your computation down at the bottom of 10 is the net amount Sunkist obtained for oil and peel?

The Witness: Yes, sir.

The Court: 27,000.

The Witness: Yes, sir.

The Court: Then based on Finley's testimony you computed the average amount per ton that Sunkist obtained for the oil and peel?

The Witness: That's right, sir.

The Court: $3.76?

The Witness: No. The average amount per ton is based [1874] on the $27,110.06 divided by 7,000

(Testimony of Robert Hodge.)

odd tons. That Finley note is just a note in there for the part of the testimony. It has nothing to do with the computation.

The Court: Then actually your computation was based on the 27,000 figure, $27,110.06 divided by 7,000 some tons, which was the total number of tons shown in the very beginning of the exhibit?

The Witness: Yes, sir.

The Court: Then in 11 you took the total tons processed under the contract, right?

The Witness: Yes, sir. Divided the total sales price by the number of tons and arrived at the sales price per ton.

The Court: Which figured $52.85 per ton?

The Witness: Yes, sir.

The Court: Then you took certain deductions which are listed as (b), (c) and (d)?

The Witness: Yes, sir.

The Court: You say under (b) manufacturing cost (item 5) per ton to allow—it must be to be allowed to Silzle.

The Witness: It was allowed. The "to" shouldn't be there.

The Court: "but not paid."

The Witness: Yes.

The Court: At certain rates and you get $29.93 a ton? [1875]

The Witness: Yes, sir.

The Court: When you say allowed and not paid, you mean that there was a bookkeeping transaction between Silzle and Exchange Orange on this matter?

(Testimony of Robert Hodge.)

The Witness: According to the excerpt I have from the agreement—I call it agreement—the compilations and tables, this amount was not paid. It was merely allowed to them. [1876]

The Court: In other words, Silzle originally, under the contract, one part of the contract, was to be paid a certain amount for processing the goods?

The Witness: That's right.

The Court: Which would have meant that Silzle had money coming?

The Witness: Right.

The Court: Then when Silzle bought the cases, Silzle owed money back to Exchange Orange?

The Witness: That is right.

The Court: So instead of sending their checks back and forth, they crossed off the items?

The Witness: They merely allowed—offset one against the other.

The Court: So the $29.93 then is your computation of what Silzle was entitled to per ton for doing this processing?

The Witness: That is right, sir.

The Court: Now, what is (c)?

The Witness: (c) are the allowances set forth under 7 for label allowance, advertising allowance, and trucking allowance under the purchasing agreement.

The Court: Which were deductions that Silzle then got from the price he paid for the goods?

The Witness: That's right, they were allowed over and above the processing charge. [1877]

(Testimony of Robert Hodge.)

The Court: Then (d) are the sales expenses and so forth, the 12½ per cent item?

The Witness: Yes.

The Court: Figured out per ton?

The Witness: Per ton.

The Court: Then your total that appears, "Total Manufacturing Cost, Allowances and Sales Expense, Brokerage and Profit," was what you computed to be the credit that Silzle had per ton, against the $52.85 per ton sales price?

The Witness: $52.85, that is right, sir.

The Court: Then you finally arrive at (e), which would be the additional amount paid by Silzle to, you say Sunkist—Exchange Orange, I suppose?

The Witness: Yes.

The Court: ——per ton over and above his credit?

The Witness: Over and above his credit, which represents the price of the fruit paid per ton.

Mr. Strachan: May I ask a preliminary question there, your Honor?

The Court: Yes.

Mr. Strachan: You have that $12.59, which you just said was the price paid for the fruit. I thought earlier you said what Sunkist got in total for the fruit was that $12.59, plus the peel and peel products, which was $3.76?

The Witness: Yes, under the contract Silzle was to pay [1878] so much for the fruit and turn over the oil and the peel. So you should add the $3.76 to

(Testimony of Robert Hodge.)

the $12.59 for the total amount that Sunkist got for the fruit.

Mr. Strachan: Would it be correct to say that the $12.59 alone is not the price for the fruit, but is the price that was realized by Sunkist for the juice portion of the fruit, which was retained by Silzle?

The Witness: Yes, I think that would be correct to state it that way.

The Court: I think I can straighten out what the witness means on this.

As Mr. Strachan has pointed out, the $12.59 under this witness' computations is what Silzle would have been paying, and what Exchange Orange would have been getting for the juice.

Mr. Strachan: That is right.

The Court: But if Silzle had gone out and bought oranges on the market, Silzle would also have had a peel and an oil, is that right?

The Witness: That is true.

The Court: And, therefore, you must calculate the peel and the oil, which Silzle didn't get—it gave back this peel and oil to Sunkist—therefore you have to calculate the peel and the oil to show what Sunkist was getting——

Mr. Strachan: For the whole orange.

The Court: ——for the whole orange. [1879]

Mr. Strachan: Right.

The Court: All right.

We will work on this a while.

Let me point out another issue as we go along. The defendants have a contention here that should

(Testimony of Robert Hodge.)

be called to your attention. I have called attention to these contentions. The defendants say that you can't make this kind of a comparison. The defendants say that the selling of product fruit at so much per ton is one thing, the processing contract is another, and that you should not make this kind of a comparison between what you pay for processing fruit and what you might calculate would be the result from a processing contract.

Is that right?

Mr. Strachan: Yes, sir.

The Court: So when Mr. Strachan sits here and is agreeable, that doesn't mean that he is agreeing that he thinks this is the way you can compute this.

Does that state your position?

Mr. Strachan: I think it does, your Honor, yes. [1880]

* * *

Q. (By Mr. Dixon): Mr. Hodge, directing your attention to Plaintiff's Exhibit 66, by referring thereto can you state to the jury, based upon the computations referred to in 66, what the actual amount paid by Silzle to Sunkist or Exchange Orange per ton for the number of cases processed by Silzle from the tonnage delivered to Silzle by Exchange Orange under the contract would be per ton?

A. Paid for what? I don't quite follow you. I'm sorry.

The Court: Per ton of oranges.

The Witness: For the fruit?

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): Yes, based upon the number of cases actually processed under the contract, converted into tons, without taking into consideration the peel and oil.

Mr. Strachan: I don't think that's a fair question in the light of the witness' previous testimony, that it was a combination of the two that paid for the fruit, and that the one paid only for the juice component and the peel was paid for in kind.

The Court: The question is only part of the problem. [1881]

Mr. Dixon: That's right.

The Court: The objection is overruled.

Mr. Dixon: That's the first question.

The Witness: They would have paid the amount actually paid—well, no, it isn't actually paid, either, because there are bookkeeping transactions there.

The Jury: We can't hear.

The Witness: I am sorry, The amount actually paid for the whole fruit, according to my computations, would have been $16.35 a ton. Is that your question?

The Court: And they have been permitted to keep the peel and oil?

The Witness: That's right.

Q. (By Mr. Dixon): Now, can you state to the jury what the amount received by Exchange Orange for the peel and oil under this contract with Silzle was per ton?

A. Sunkist or Exchange Orange, rather, received $3.76 a ton for the oil and peel under this contract.

(Testimony of Robert Hodge.)

Q. And the amount remaining, or $12.59, then, would represent what?

A. Would be the amount paid for the juice part of the fruit.

Mr. Dixon: The plaintiff offers 66 in evidence, your Honor, for the sole and only purpose of indicating the basis of the computations contained therein as determined by the [1882] testimony of this witness, and not as any other evidence, or not as evidence.

The Court: Well, it will be received for that purpose, but I think there should be added to it, after the last item, if this doesn't violate the witness' computations, for juice $12.59, and then on another line, received by Exchange Orange, oil and peel, $3.76, and then total the two together. Would that violate you——

The Witness: No, and then the total paid for the whole fruit.

The Court: Whole fruit.

The Witness: $16.35, yes, sir.

The Court: That can be done later. 66 is received in evidence for a limited purpose.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 66.)

The Court: 66 is not like another exhibit. It is not like the Silzle contract. It is not like the exhibits you heard about of the permit from the Corporation

(Testimony of Robert Hodge.)

Commissioner, or not like books or records or copies of them. This is illustrative only.

All right. [1883]

* * *

The Court: Pass out Exhibit 67.

Exhibit 67, ladies and gentlemen of the jury, if and when offered and received, is another one of these illustrative exhibits.

Mr. Witness, have you done the same thing and made a computation based on the TreeSweet contract, which was Plaintiff's Exhibit 20, and on the compilation and tables, Plaintiff's Exhibit 11?

The Witness: I have.

The Court: You have done it in much the same fashion as you did 66?

The Witness: Yes, they follow along.

The Court: So that items 1, 2 and 3 are items which in your opinion reflect the same thing, expressed in different terms, the first item being tons, the second item being gallons, and the third item being cases?

The Witness: Yes.

The Court: Then you followed through with the amount [1884] that would be paid for the processing, if it had actually been paid by check, but which was also handled as a bookkeeping entry in the final windup?

The Witness: Yes, sir.

The Court: And you went ahead with the label allowances. I notice one big difference, and that is the amount at the bottom of page 2 which Sunkist

(Testimony of Robert Hodge.)

obtained for oil and peel. By Sunkist there, I suppose you mean Exchange Orange?

The Witness: Yes, sir.

The Court: It was a larger amount per ton than in the Silzle matter.

The Witness: The oil had a much greater yield from the fruit that TreeSweet was furnished over the fruit that was furnished to Silzle. The yield per ton was much greater.

The Court: I think we have had testimony on something like that, have we not?

Mr. Dixon: Yes.

The Court: That the TreeSweet plant was more efficient in the oil recovered?

Mr. Strachan: It was more effective in recovering the oil, yes, sir.

The Court: Than the Silzle plant was?

Mr. Strachan: Yes, sir.

The Court: Then you have done the same thing in your final computation on item 12. The first item would be the [1885] gross per ton for oranges that TreeSweet would have had to pay if they hadn't had some credits, but they had credits for processing, labeling, advertising, a 15 per cent discount, and you arrived then, finally, at the $14.29 figure, which is the amount that it would have cost TreeSweet, and the amount obtainable by Exchange Orange for the juice?

The Witness: Right.

The Court: And since if TreeSweet had gone out

(Testimony of Robert Hodge.)

and bought oranges to do their processing, Tree-Sweet would then have owned the oil and the peel?

The Witness: That is right, sir.

The Court: So there should be added, then, for purpose of comparison, the $10.81 at the bottom of page 2 to the $14.29?

The Witness: Yes, sir.

The Court: And the total figure would be what you would think would be a comparison figure for the proceeds from the whole fruit, oil, peel and juice?

The Witness: Yes, sir.

The Court: Will you also correct 67 in the same manner that I indicated to correct 66?

Mr. Dixon: Yes, sir.

The Court: Again, all the items in here are based upon matters in the record of this case, the exhibits that have been received in evidence? [1886]

The Witness: Yes, sir.

The Court: I don't notice here, even, any note——

The Witness: Yes, at the top of page 3 there is a note that I have not read or know anything about.

The Court: There is a note there, again, as to Finley's testimony, which you obtained by representations of counsel that that is in the record?

The Witness: Yes, sir.

The Court: But you didn't include those in your computations?

The Witness: No, sir. That is merely a memo.

(Testimony of Robert Hodge.)

The Court: You made your computations on the other figures?

The Witness: Yes, sir.

Mr. Dixon: Your Honor, we offer Plaintiff's Exhibit 67 in evidence as an exhibit for the sole and only purpose of indicating the manner and method by which this witness arrived at the figure of $14.29 per ton, as reflected in item 12(f), and the figure of $10.81 per ton as reflected in item 11, the total items adding up to $25.10 per ton as being the cost that would have been paid for the fruit processed by TreeSweet under its contract, had it been purchased from Exchange Orange.

The Court: Received in evidence, but for the limited illustrative purpose, and not evidence in itself. [1887]

* * *

The Court: Before the question, let me also say that Mr. Strachan's position as to 67 is the same as to 66; that he does not concede that this type of comparison may be made, and by his silence he is not conceding this.

He can't argue his case now, he has to wait until the evidence is all in, but I think that is his position, the same as to both contracts.

Mr. Strachan: That is correct, your Honor.

The Court: Now go ahead.

Q. (By Mr. Dixon): Mr. Hodge, based upon your knowledge of the operations of Winckler & Smith for the years '49 and '50, and the records made available to you by Winckler & Smith con-

(Testimony of Robert Hodge.)

cerning the cost to Winckler & Smith for processing a ton of Valencia oranges into single-strength Valencia juice, and assuming for the purpose of my question that 15,000 tons of Valencia oranges would have been available or made available to Winckler & Smith for processing into single-strength juice under the same terms and provisions as are contained in the TreeSweet-Exchange Orange contract referred to in Plaintiff's 67, do you have an opinion as to the profit, if any, which Winckler & Smith would have made on such an [1888] operation?

A. I do.

Q. Will you state what the profit, if any, would have been under those circumstances that I have just stated?

Mr. Strachan: Your Honor, I think in order to test the adequacy of the basis for the opinion it might be well to have him tell us what data he used and how he made his computations, so that on an objection you could determine the admissibility of the opinion.

The Court: Yes. I am going to instruct you later as to opinion testimony, a formal instruction, that any witness who is skilled in a trade or art or craft may give an opinion, and he may give reasons upon which he bases his opinion, and the opinion is only as good as the reasons.

If you think the reasons aren't good, you may disregard the opinion or give it such weight as you may think it is entitled to.

In other words, the opinion of a witness is ad-

(Testimony of Robert Hodge.)

missible in evidence, but it is to be tested by the basis of the opinion.

To give you a crude example: Supposing a man got up here and was asked his opinion, he had been qualified as an expert—this man, of course, has been qualified as a CPA—and he gave an opinion on some matter, and then he was asked what his reason was, and he said, "I went home last [1889] night and looked in the crystal ball, and that is the answer I got"—well, I would probably apprehend that that could go in evidence, but I would likewise apprehend that most of you would chuck that opinion out the window as having no basis, except the crystal ball on which it was based.

I want to hear this question again, Mr. Dixon, before it is answered.

Mr. Dixon: My first question is if he has an opinion, then if he has I will ask for his opinion and have him explain it.

The Court: But the long question you asked. I was making a note on another matter and I don't know whether I got it all.

Read it, Mr. Reporter.

(The following portion of the question referred to was read by the reporter: "Mr. Hodge, based upon your knowledge of the operations of Winckler & Smith for the years '49 and '50, and the records made available to you by Winckler & Smith concerning the cost to Winckler & Smith for processing a ton of

(Testimony of Robert Hodge.)

Valencia oranges into single-strength Valencia juice"——)

The Court: The first part of your question, "upon your knowledge of the operations"; this question has to be based upon the books, and maybe that is what you meant. [1890]

Mr. Dixon: Yes, that is what I did mean.

The Court: But not anything else.

This witness has not been qualified about knowing anything about making juice out of fruit. So I think you had better ask the question again. [1891]

Q. (By Mr. Dixon): Based upon the figures and any other data available to you from the books of Winckler & Smith for the years 1949 and 1950 concerning and relating to the cost to Winckler & Smith of processing a ton of Valencia oranges into single-strength Valencia juice, and assuming, Mr. Hodge, that in 1951, based upon the records of Winckler & Smith for the years 1949 and 1950 that I have just referred to, that Winckler & Smith would have had made available to it, let us say, 12,000 tons of Valencia oranges for processing into single-strength juice under the same terms and conditions and arrangements as are set forth in the TreeSweet contract referred to in Plaintiff's Exhibit 67—taking all of those things into consideration, do you have an opinion as to whether Winckler & Smith would have processed or operated through processing the 12,000 tons of Valencia oranges on the same basis at a profit during the year 1951?

(Testimony of Robert Hodge.)

Mr. Strachan: May it please the court, on the substance of the matter I object on the ground that there is in the record no legal or factual basis to support the assumption there was any obligation on the part of the defendants here to enter into an arrangement with Winckler & Smith or any other person to furnish oranges on the same terms they furnished to TreeSweet.

Furthermore, I don't think that the question—well, this is just a question of whether he has an opinion, and I [1892] think whether he has an opinion one way or the other is immaterial.

The Court: Objection overruled. The question is now worded so it didn't tie down where the 12,000 tons would come from, and that is an issue in the case. Your objection as to whether there was an obligation raises an issue in the case which can be solved only by the court's instructions.

Mr. Strachan: That is correct.

The Court: And considerable argument by counsel.

Mr. Strachan: That's right.

The Court: But the particular question didn't tie the 12,000 tons to any supplier. I am still worried about the last part of the question, whether you said processing those 12,000 tons at a profit, whether Winckler & Smith would process those at a profit, or whether the question was whether Winckler & Smith on the basis of their books and records, after processing the 12,000 tons, would have made a profit instead of a loss.

(Testimony of Robert Hodge.)

Mr. Dixon: That was my question, your Honor. Thank you for the suggestion.

The Court: I was confused on it. The question relates to which?

Mr. Dixon: To the availability of the 12,000 tons under the same arrangement and as to whether or not, assuming that they were available under the same arrangement, whether Winckler & [1893] Smith would have, during the year 1951, the fiscal year ending January 31, 1952, have operated or shown a profit for that fiscal year.

Q. Do you understand the question, Mr. Hodge?

A. Yes, I understand the question.

The Court: All right. We will assume the same objection went to this question as amended, and the objection is overruled. Do you have an opinion?

The Witness: I have an opinion, yes, sir.

Q. (By Mr. Dixon): Now, will you state to the jury what that opinion is?

Mr. Strachan: I make the same objection, lack of foundation.

The Court: Same ruling. Objection overruled.

The Witness: My opinion is Winckler & Smith, if they had had 12,000 tons available to them for processing, had processed it and sold it, would have had a profit of approximately $10,000 in the year ending January 31, 1952.

Q. (By Mr. Dixon): Now, will you tell the jury how in stating that opinion you arrived at the $10,000 profit figure?

The Court: By the $10,000 profit figure, before

(Testimony of Robert Hodge.)

you answer counsel's question, you mean instead of having the loss shown on the financial report that you prepared, instead of an operating loss, for that, you would have shown a profit? [1894]

The Witness: Would have shown a profit of some $10,000, your Honor.

The Court: All right.

The Witness: My computation was arrived at in this way. TreeSweet was paid 35.57 per ton for processing. Winckler & Smith's processing cost for the 1949 season, which I have used because that was the true Valencia season—1950 had many other products in it and was not a true Valencia season, so I used the 1949 processing cost—their costs total $34.06 a ton. That was made up as follows:

Ingredients, $2.14; cans, $15.17; cartons, $2.01; labels, $1.17; drums, 25 cents; sacks, 38 cents; plant expenses, $11.10.

The inventory increased during this period to the extent of $1.23 a ton, so I subtract that from all these costs.

To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 per ton, or a total of $18,120 profit on processing.

TreeSweet was allowed $1.59 a ton for a label allowance, times 12,000 tons would have meant $19,080.

(Testimony of Robert Hodge.)

They were allowed $1.88 a ton for advertising, which [1895] would have meant $22,560.

The 15 per cent discount they were allowed was $9.41 a ton, or a total of $112,920.

This totals to $172,680.

From that I deduct Winckler & Smith's actual selling cost in the year 1952, as shown in my report, of $87,652.40.

Now, inasmuch as they would have had these additional sales, they would have had to pay additional brokerage, so I deducted another $37,500 from that, which makes a total of $125,152.44 to be deducted from the $172,680, which gives me a figure of $47,527.56.

From that figure, I also take the excess of general administrative expenses for the year 1952 over the year 1950 of—the general adminstrative expense for 1952 was $93,713.49. The general administrative expense for 1950 was $56,417.38, or a difference of $37,296.11.

Taking that from the $47,527.56, I arrived at a net profit for the year's operation of $10,231.45.

Q. (By Mr. Dixon): In other words, if I understand your answer clearly, the $184,000 loss covered in Plaintiff's Exhibit 65 for the operating year ending January 31, 1952, would have been recovered, and in addition to the recovery of that item, there would have been this operating profit for the year from these operations, is that correct?

A. That is true. [1896]

Q. Now, Mr. Hodge, can you indicate to what

(Testimony of Robert Hodge.)

extent, if any, that profit would have been increased had the amount of tonnage been increased to 15,000 tons instead of 12,000?

A. Computed on the same basis as I computed the 12,000 tons, the profit would have amounted to $54,026.45, instead of $10,231.45 for the 12,000 tons.

* * *

Cross-Examination

By Mr. Strachan:

Q. In that exhibit, as I understand it, Mr. Hodge, your computation was based upon 7,203 and a fraction tons of fruit processed during the season.

A. That is true, processed under this particular contract.

Q. Yes. Now, did you know at the time you made that [1897] computation that that 7,000 some odd tons of fruit included about 528 tons that were not accounted for on the basis referred to in Exhibit 66, but were accounted for as whole fruit, and that Sunkist received from Silzle on account of that 528 tons of fruit $11,878.87, and that that was calculated at the rate of, I think it was $22.50 a ton, which income is not included under the proceeds of the Silzle contract reflected in Exhibit 66?

If you don't know, I wish you would check it over overnight and tell us if that is a fact in the morning.

The Court: For the benefit of the jury, to refresh your recollection, you recall that there was testimony that when Exchange Orange first began to supply Silzle, it was done upon a tonnage basis, a

(Testimony of Robert Hodge.)

certain amount of tonnage was supplied, and then later a contract was entered into and later that tonnage was paid for on some other arrangement?

Mr. Strachan: That's right.

The Court: Is that the testimony you are referring to?

Mr. Strachan: That's right. That tonnage is dealt with in the 7,200 and some tons processed under the Silzle contract, but the income from that has not been included in the computation, I believe. I would like to have the witness check on that overnight.

The Court: Now, let's see if we can agree on this. Is the 528 tons included within the—— [1898]

Mr. Dixon: Yes, your Honor, it is, according to the answer set forth in Exhibit 11, from which that figure was taken.

Mr. Fisher: It is.

The Court: Overnight, then, you may have to make another computation for us of computing 528 tons at $22.50 per ton.

Mr. Strachan: Well, I think the adjustment could most easily be made by simply including it in the proceeds realized by Sunkist at $11,878.87.

The Court: That would, I think, throw you off because you have already a charge here on the basis of this computation for 528 tons. It would seem to me that to make it accurate you would have to take that into account. You would have to make two computations. One a tonnage of 7,203 less 528, based upon the computation in 66, and add to that another

(Testimony of Robert Hodge.)

computation of 528 tons based on the computation at $22 a ton, isn't that true?

Mr. Strachan: Well, I think that is one way of doing it. The way I had in mind was just to take the tonnage he has dealt with here——

The Court: Maybe it would come out the same way. I don't know.

Mr. Strachan: I don't know.

The Witness: May I ask a question?

The Court: Yes. [1899]

The Witness: From the EOP subpoena to produce documents, it is not clear what the $215,602.10 was paid for, whether it is the whole 7200 tons or the 7200 tons less the 528 tons. That is the reason this was done this way. It cannot be determined. I do not know from the information——

Mr. Dixon: I might say for the record, your Honor, that since they have reported in the return the 7,203 tons, we have gone on the assumption that these other figures, namely, the amount paid, represented the 10 or $11,000 counsel has referred to.

The Court: Now you both have something to do overnight. You better check into that, Mr. Strachan. I haven't seen the subpoena, the return to the subpoena, but you understand the point counsel is making?

Mr. Strachan: I do.

Mr. Dixon: If that is true, then there is no need to go into it, because it is already included, your Honor, that is my point.

Mr. Strachan: I think that before we leave the

(Testimony of Robert Hodge.)

court room, we may as well get together and clarify that.

The Court: Yes. Do you have any other questions?

Mr. Strachan: That's all on the preliminary.

The Court: Then you have got your work cut out for you tonight. [1900]

* * *

The Witness: Judge, before we start, may I correct a statement I made yesterday. [1906]

* * *

Now, Mr. Witness.

The Witness: In making a statement yesterday as to the profits that would have been made by Winckler & Smith had there been made available to them 12,000 tons of Valencias, which they could have processed and sold, I stated that the profit would have been $10,000. I find that in my computations I allowed a 5 per cent brokerage fee, when the company never paid more than 3. So, therefore, my estimate of the profit should be revised to $25,231.45 for the 12,000 tons, and $72,776.45 for 15,000 tons.

I also notice an error on 66, on item 11(d). It speaks of $380,690.24——

The Court: Wait a minute. Exhibit what?

The Witness: Exhibit 66.

The Court: Which page?

The Witness: Item 12(d), page 3. Rather, 11(d), page 3.

The Court: Yes? [1908]

(Testimony of Robert Hodge.)

The Witness: It speaks of a figure of $380,690.24. That should be $47,586.28.

The Court: All right.

Now, do each of you have 66 in front of you?

A Juror: Yes.

The Court: Turn to the last page which starts with the numeral 11. Do you find that? Under the numeral 11 there is (a), (b), (c), (d). When you get down to (d) there is a computation there that results in a figure of 6.61.

The resulting figure is right?

The Witness: The resulting figure is correct.

The Court: Don't correct it yourselves; we will have it corrected later for you, but the line immediately preceding that speaks of 380 thousand some odd thousand dollars, divided by 7,000 some odd tons, the 380,000 figure is wrong, it should be 47,000 some odd dollars divided by the 7,000 tons. The resulting computation of 6.61 is correct, but there was——

The Witness: An error entered in typing it.

Mr. Fisher: May the witness state the exact amount?

The Witness: $47,586.28.

It is the same figure as shown under item 9.

The Court: We will make the corrections later.

Mr. Dixon: May it please the court, I think in view of the inquiry made by counsel last night to this witness on Exhibit 66, we have been informed by counsel that the 7,203 [1909] ton figure is not the amount processed. In other words, it did not include the 537 odd tons.

(Testimony of Robert Hodge.)

The Court: 528 tons.

Mr. Dixon: Yes.

The Court: Is that correct, now?

Mr. Strachan: That is my understanding, your Honor, yes, sir.

The Court: In other words, the factual situation—and where there is no dispute as to these facts, we ought not quibble about them, but just get them out of the way—the factual situation is that there was processed by Silzle 528 tons, and in addition 7,203 tons?

Mr. Fisher: No, your Honor.

Mr. Strachan: The 7,200 is inclusive of the 528 tons.

The Court: That isn't what you said, Mr. Dixon.

Mr. Dixon: That is what I intended to say.

On the basis of the return that we had, we were informed by the defendants that under the contract the net tons processed was 7,203 tons .195, which included the 527.95 tons that were covered in the contract at $22.50 a ton as having been paid for on that basis. We, therefore, on that statement took the 7,203.195 tons as being the total processed under the contract, according to the return. We are informed, however, that the figures on which Exhibit 66 is computed or determined must be limited to 6,675.245 tons, in [1910] view of the fact that the difference, the 527 tons were paid for at $22.50 a ton, and therefore the peel and the juice items would not be included in any of these computations, because they would belong to Silzle.

(Testimony of Robert Hodge.)

The Court: What does that mean? Are you going to revise 66?

Mr. Dixon: Yes, your Honor. It would mean, and the witness is prepared to revise the figures, and he can do so, that where the figure 7,203.195 tons appears on 66, it should be changed now to 6675.245 tons, and that would make some difference in the figures which this witness is ready to change.

The Court: Then I suggest this: Rather than do this here, you take a copy of 66 and at the noon hour let the witness make his revision of it.

Mr. Dixon: He has already done so, your Honor, and we can prepare, perhaps, a new one on this, which would be in accord with what now appears to be the fact, and withdraw this one.

The Court: What do you suggest?

Mr. Strachan: In the first place, I don't agree that the tonnage should be reduced. You will recall that a total of 7200 was what was delivered under the arrangement made between Finley and Mrs. Silzle, and that arrangement was not reduced to writing until many months after the arrangement was put in effect. Now, the only difference between the 528 [1911] tons and the balance of the 7200 was this: Originally Silzle returned, made a return in cash for the fruit on a cash basis for the 528 and kept or disposed of the peel and by-products. Now, after that——

The Court: I forget, now, did he actually make those payments, or was that later on picked up in the contract?

(Testimony of Robert Hodge.)

Mr. Strachan: No. What happened was this: That they hadn't worked out the basis for accounting, and the peel, I believe, had been disposed of and you couldn't go back and say, "Give us so much peel and so much oil," so they shortcut the thing and the return for the whole fruit was computed under the arrangement with Finley, and they just settled for fruit and peel and the whole tonnage at the yield per ton. Now——

The Court: You mean the 528 tons were settled for on that basis?

Mr. Strachan: That is right.

The Court: And the remaining tons on the other basis?

Mr. Strachan: The remaining tonnage was settled for by returning the peel and oil in kind, and then accounting for the juice component in cash, but it was all a part of the same arrangement.

The Court: With that statement, can you spend some time this noon hour on working over this exhibit?

The Witness: I don't believe it will change the computations, [1912] your Honor. If the figures are for 66 point——

Mr. Strachan: If he says it wouldn't change it——

The Court: He means they would change——

The Witness: From the revised figures.

Mr. Strachan: We haven't seen the revised figures.

The Court: I suggest that you put it over.

You have other work to do?

(Testimony of Robert Hodge.)

Mr. Strachan: Yes.

The Court: Put it over to the noon hour and discuss it a little between you.

Mr. Strachan: Yes. [1913]

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, will you state briefly what preparation and education and study you pursued to qualify for your accounting position?

A. When I was in high school, my folks had a very serious automobile accident which depleted their funds, so it took all the cash of the family, so I wasn't allowed—couldn't go to college, so I went to work in a bank for about five years, and during that time and for about four more years I attended night school and got my accounting knowledge at night school.

I went to USC, and what was then the branch out on Vermont, which is now UCLA, and also Southwestern University during those nine years.

Q. Since the time you commenced practicing accounting, what in general would you say have been the fields of experience in which you have been active?

A. During my experience with Price-Waterhouse I worked on very large audits. I mean I had charge of audits like Western Union, Bethlehem Steel, very large concerns like that, while I was in New York.

Locally, I had charge of audits like Richfield Oil

(Testimony of Robert Hodge.)

and Union Oil, so I have had very diversified experience in some 25 years of public accounting [1914] work.

Q. Have you had occasion to specialize in cost analysis and cost accounting?

A. I did not make a specialty of cost accounting. I naturally studied it. It is necessary to get your CPA degree that you have a good ground of cost accounting. I have worked on many cost problems for firms like Bethlehem Steel and organizations of that nature.

The Court: Just throw that voice out a little.

The Witness: I am sorry, Judge.

The Court: It will make it easier for everybody to hear you.

Q (By Mr. Strachan): I suppose you belong to professional associations and organizations?

A. Yes, sir. I am a member of the American Institute of Accountants and the California Society of Certified Public Accountants.

Q. When did you first come in contact with the Winckler-Smith organization?

A. My partner, the man I was associated with then, a Mr. Moore, had met Mr. Winckler and had done the accounting during the partnership. At that time Mr. Moore decided to not be quite so active, so he turned the accounting of Winckler & Smith, that is the auditing of Winckler & Smith over to me about the time of the incorporation in 1946.

Q. Did you have a staff of accountants working for [1915] you at that time, or did you do the work yourself?

(Testimony of Robert Hodge.)

A. We had one, two or three men working for us at that time.

Q. What was your own personal contact with the accounting for Winckler & Smith?

A. I supervised the auditing and the general problems that came up. Mr. Winckler would call me when he had a problem and I would go down and discuss it with him.

Q. Who set up and arranged to install the accounting records kept by the Winckler-Smith Corporation?

A. They were set up by my partner, Mr. Moore, in 1945. The original records were set up at that time.

Q. Were those same records and methods carried through with later?

A. No. We changed our accounting methods from time to time, particularly as to cost and inventory control, and things of that nature.

Q. You did set up a cost accounting system?

A. We set up a cost accounting system, yes, sir.

Q. Was that cost accounting system maintained regularly throughout the corporate operations?

A. From time to time the accountant in charge would revise it to take care of changing conditions.

Q. What was the purpose of that cost accounting system? Was it for the purpose of pricing products that were put in [1916] inventory?

A. That was one purpose of it. The other purpose was to enable the sales department to determine at what price the products could be sold.

(Testimony of Robert Hodge.)

Q. Do you know Arthur D. Pedlar?

A. Yes, sir, I know Mr. Pedlar.

Q. Was he from time to time connected with Hodge Moore, or Hodge & Company?

A. Yes, sir. Mr. Pedlar worked for me for several years.

Q. During what period did he work for you?

A. He left in 1945. I believe he was with me probably three or four years before that. I wouldn't pin it right down, but it would be three to four years he was with me prior to that time, so he must have been in my employ for some time in 1942 to '45.

Q. Did he ever do any work on the accounting problems of Winckler-Smith?

A. Yes, sir. Mr. Winckler—Mr. Pedlar had more or less charge of the auditing. He went down and did all the preliminary work and I came down and supervised the final report.

Q. Well, if Mr. Pedlar left you in 1945, he didn't have anything to do with the audit except for one year, did he?

A. I am not certain of that. I could go through the [1917] papers and find, if you wish, but I wouldn't—it seems to me he was down there two or three times, but I am not certain of it.

Q. When Mr. Pedlar left your employ, did you know where he went? A. Yes, sir, I do.

Q. Where?

A. He went to Winckler & Smith. He worked for Winckler & Smith.

(Testimony of Robert Hodge.)

Q. In what capacity?

A Juror: Can't hear you.

The Witness: Mr. Pedlar left my employ to work for Winckler & Smith. He went there in the capacity of a comptroller. He was in charge of their accounting. [1918]

* * *

Q. (By Mr. Strachan): Now, when you made these semi-annual audits and the annual or semi-annual audit reports, did you preserve the working papers which underlay those audits and reports?

A. They are preserved in the main. Due to storage problem—our office is not a large one—we cannot keep papers forever, so it is our practice after three or four years to go through and take out what we consider the unnecessary papers. However, I have the main papers of all of our audits.

Q. Will you tell us how many audit reports you made for Winckler-Smith, identifying each period covered? A. The corporation?

Q. You made one for the partnership, did you not?

A. I believe there was one made for the partnership. I am not certain.

Q. Will you tell us the period covered by your successive audits of Winckler-Smith Corporation?

A. May I put it this way? Except for the period during which they were operating under Chapter XI and until the time they went into receivership—is that the correct term?—under Chapter X, we made a semi-annual audit. In other words, we made

(Testimony of Robert Hodge.)

an audit every six months during all [1919] the time the corporation was operated by its own officers.

Q. Well, then, as far as year end audits are concerned, you made none for the year ending January 31, 1949, because the operation was then in the Chapter XI reorganization, is that correct?

A.—I believe that is correct. There was no audit made by us from July 31, 1949, to—the next audit was as of January—wait a minute. I do not have all of my papers here, counsel, but to the best of my recollection we did not make an audit as of January 31, 1949. The first audit that I have here a record with me is the audit as of July 31, 1949, so we did not make one for January 31, 1949.

Q. Will you give us a general definition of what is meant by the term working capital?

A. In accounting the term working capital, broadly speaking, would be the excess of your current assets over your current liabilities. That would be a broad definition of the term.

Q. Are you able to say, based upon your experience, what is normally regarded as a safe working capital position?

A. That varies considerably in the various types of industry. What might be very safe for one industry would be very unsafe for another.

Q. Well, can you give us an illustration as to types of industry? [1920]

A. I do not have the surveys in front of me. Broadly speaking, in normal businesses, I would say

(Testimony of Robert Hodge.)

a ratio of about two to one would be very safe, but I could not give you specific examples of various industries from memory.

Q. So that the court and the jury and I can understand what you mean by two to one ratio, you mean that your current assets would be twice as much as your current liabilities?

A. That is true.

Q. So that if you paid all of your current liabilities immediately, you would still have left an amount that would be half of your current assets before you paid your current liabilities? A. That is true.

Q. Can you think of any line of business or occupation in which you would say it would be safe to have a condition in which the current liabilities were in excess of the current assets? I am talking about a going business.

A. By current liabilities you mean any liability that is paid within 12 months of the date of the balance sheet I assume. Well, there could be circumstances that that would not be unsafe. Assuming a corporation had spent a tremendous outlay to get in operating status, and the expenditures for that outlay were classified, say, as deferred charges and not as current assets, that could conceivably arise.

Normally, it would be very unsafe for a firm to have [1921] its current liabilities in excess of its current assets, I would say.

Q. Ordinarily, you wouldn't expect creditors to extend credit or advance money to an operating

(Testimony of Robert Hodge.)

business that had its current liabilities exceeding its current assets, is that correct?

A. I would say the normal creditor would not. A creditor who knew the industry very well might. I mean if he knew the special circumstances and anticipated the company making profits sufficient to repay his advances, he might.

Q. I would like to refer, if you please, to Plaintiff's Exhibit 60, which is the income account for the six months ended July 31, 1949. Have you a copy of that before you? A. I have.

Q. Now, in keeping an income account for a given period in ordinary accounting practice you would reflect in that profit and loss statement, as it is sometimes called, all items of profit and all items of loss that occurred within the period under review, is that correct?

A. All operating items of income and profit would normally be in the income account, yes, sir.

Q. Now, if in addition to the gain or loss on operations, the business had a gain or loss on, say, property, say on an automobile, would that, if it happened or was recorded within the period, not be taken into the profit and loss? [1922]

A. Yes, sir. That would be normally shown on the income account. That is a normal occurrence in business, which relates to the particular period.

Q. For example, in the income account which you prepared for Winckler & Smith for January 31, 1947—do you happen to have that with you?

A. Yes, sir, I do.

(Testimony of Robert Hodge.)

The Court: That is not one of the exhibits?

The Witness: No, sir.

Mr. Strachan: They don't have that, but that is Defendants' Exhibit A-3.

The Court: All right.

Q. (By Mr. Strachan): That shows on the income account—do you have it? A. Yes, sir.

Q. That shows, does it not, on the income account a loss on the disposition of assets?

A. It shows a loss of capital assets dismantled of $7,709.91.

Q. That is on the profit and loss or income account, is it not? A. Yes, sir.

Q. And again in the income account which you prepared for January 31, 1948——

A. I do not have that statement with me. [1923]

Mr. Strachan: Mr. Figg, might we have Defendants' Exhibit A-5?

The Clerk: Yes, sir.

Q. (By Mr. Strachan): On the income account as of the end of the fiscal year 1948, you have taken into the loss for the period an item of $3,256.01, which is part of the loss for that year, is that not right? A. That's right.

Q. That was the loss from the sale of an automobile?

A. No, sir, that is not right. The loss from the sale of the automobile is $333.34.

Q. That's right.

A. The $3,256.01 is not a loss. It is income.

Q. That is income, but that is net after you have reflected the loss on the sale of the automobile?

(Testimony of Robert Hodge.)

A. That is true.

Q. Now, in the six months' period ending July 31, 1949——

The Court: That is 60?

Mr. Strachan: That is Exhibit 60.

Q. During that period, isn't it a fact that the Winckler-Smith Corporation fixed assets were sold as of March, 1949, at a loss of $169,000, which loss is not reflected on the income account?

A. That is true. The assets were sold at a net loss of $169,377.32. [1924]

Q. As of what date?

A. As of March 1, 1949. These fixed assets were sold in connection with the reorganization of the company and were not sold in the normal course of business.

Q. But they were sold within the six months ended there, were they not?

A. That is true. But they were not sold under any normal operating business procedure.

Q. But, after all, when you are dealing with that six months period between January 31, '49, and July 31, '49, there was a bookkeeping loss recorded in March of $169,000?

A. That loss occurred during the operations of the—pardon me. What is the man, technically, a trustee or receiver, under Chapter 11? I am not familiar with it.

Mr. Fisher: Trustee.

The Witness: Well, whoever was operating the

(Testimony of Robert Hodge.)

business at that time, it was during his operations that this loss arose.

This did not arise during the operations of Winckler & Smith Citrus Products, themselves.

Q. (By Mr. Strachan): Well, that $169,000 loss was not an operating loss, was it? A. No, sir.

Q. It was a loss on the sale of property, was it not?

A. Yes, sir. And it was made during the operation of [1925] the trustee.

Q. Now, if you had set up total losses, and the total profits for the six months ended July 31, 1949, on this income account, that would have showed instead of a $14,000 profit, a loss, regardless of cause, but a loss nonetheless, of $155,000 in that six months, would it not?

A. The records of the trustee were not made available to me to set up the operations for the period from January or February 1, 1949, to the termination of the Chapter 11 proceedings.

We have only reflected in our accounts the actual operations of Winckler & Smith Citrus Products Company. We have not reflected any of the transactions in this report of the trustee.

Q. In the notes and the report which accompanied this income account of Exhibit 60, you did mention, did you not, that there had been a loss?

A. We did.

Q. Now, will you just read what you wrote with regard to that loss?

A. These notes were written to explain the lease

(Testimony of Robert Hodge.)

and option which is carried on the report at $1.00. It was the purpose for putting this in. In other words, this was some very valuable asset that the corporation had. So to make a complete explanation of it. I put these notes in, which counsel [1926] wishes me to read.

Q. What was the date of this report?

A. The date of this report is August 22, 1949. Do you wish me to start on March 1st?

Q. Yes. A. Page 2.

"On March 1, 1949, the Corporation sold all of its fixed assets, subject to the mortgage payable thereon, for the sum of $50,000.00 which resulted in a loss of $169,377.32, which is summarized as follows:

"Book value of fixed assets at March 1, 1949:

"Land	$ 5,816.11
"Building	135,457.32
"Machinery and equipment	214,767.33
"Furniture and fixtures	9,638.72
"Tools	2,450.47
	$368,129.95
"Less reserves for depreciation	68,085.98"

Net total—this is not in the notes. The total is $300,043.97.

"Uncollected balance on conditional sales agreements which are secured by liens on automotive equipment	$ 9,164.00
	$309,207.97

(Testimony of Robert Hodge.)

"Deduct:

Unpaid balance of mortgage	$89,830.65	
Cash Received	50,000.00	139,830.65
"Loss		$169,377.32

"The fixed assets were sold under a lease and option to repurchase agreement which provides for the leasing of the assets until March 1, 1952, with an option to extend until March 1, 1954, and gives the Corporation the right to repurchase such assets, subject to the then unpaid balance payable on the mortgage, as follows:

"1. Option can only be exercised after September 2, 1949.

"2. If option is exercised between September 2, 1949, and March 1, 1950, the cash consideration shall be $100,000.00.

"3. If option is exercised between March 1, 1950, and March 1, 1951, the cash consideration shall be $125,000.00."

Q. (By Mr. Strachan): Unless, Mr. Witness, you think some of the rest of that pertains to this subject——

A. It all pertains to the subject, counsel.

Q. All right.

A. "4. If option is exercised between March 1, 1951, and March 1, 1952, the cash consideration shall be $150,000.00; lessee also has the privilege of repurchase from March 1, 1952, to March 1, 1954, for a

(Testimony of Robert Hodge.)

cash consideration of $150,000.00 if lease is [1928] extended.

"This lease and option agreement is carried on the books at a nominal value of $1.00."

Q. Thank you. So if you deal with the period of six months as a whole and combine the results of operation with the results of their taking a loss on the book value of their fixed assets, the net result is that from the beginning to the end of the period there was a loss of $155,000 net, is that correct?

A. No, sir, that is not correct. You are trying to deal with two separate entities, which cannot be commingled.

In other words, if the U. S. Steel operated for three months, and Bethlehem Steel operated for three months, you wouldn't combine the two operations into one statement under any accounting procedure.

Q. But of course the $169,000 wasn't an operating loss, was it?

A. No, it was not an operating loss.

Q. It was the disposition of the capital assets at less than the books showed they were worth, isn't that right?

A. It was. It was done under a court order.

Q. Now, returning again to Exhibit 60, on the last page of the exhibit you show capital stock and deficit. I would like to talk first about the capital stock which is shown there to be a thousand shares of no par stock, carried on the books as having a

(Testimony of Robert Hodge.)

stated capital of 240 some thousand [1929] dollars. Hodge and Company or Hodge-Moore were the accountants at the time that that thousand shares was issued, is that not true? A. That is true.

Mr. Strachan: I would like to have these copies of Exhibit A-1 distributed to the jurors.

The Court: All right. Distribute them to the jury, Mr. Bailiff.

Can I tell the jury something about par or no par stock? Are you going to go into that?

Mr. Strachan: I would like to have you tell me, too, Judge.

The Court: In corporate set-ups, and some of you jurors may be stockholders, shares of stock generally fall in various categories, such as common and preferred, and par and no par. There is no big mystery about it. In three or four sentences I will see if I can tell you the general difference.

First as to common and preferred. The word "preferred" means just what it says. In other words, those preferred shares have some preference, a preferential position in the set-up of the company. Sometimes preferred shares are preferred in the sense that they get, first, a fixed dividend. If there is anything left over, it goes to the common shares. The dividend rate might be fixed at 5 per cent on preferred. The common shares might get nothing or they might get 20 per [1930] cent, depending on what the corporation makes. Sometimes shares are preferred in the sense that they can be retired. A

(Testimony of Robert Hodge.)

corporation has the right to pay off the preferred shares at a certain figure.

Then we speak of par and no par value. You could have a share that says on it Par Value $100 a share.

That has just been arbitrarily fixed by the corporation as the value of the share. It might be $1.00, $100, $1,000. Par value.

Formerly, years back, most corporations had shares with par value. In recent years there has been a tendency to have, often, shares that say they have no par value.

Let's take an example. Suppose you had a number of shares that a corporation issued, and they said they had a par value of $1,000 a share. Actually, the value of those shares is what the worth of that corporation is, divided by the number of shares. So that the share might say it had a par value of $1,000, but the book value might be a dollar a share.

You have to figure out what the corporation had to back up the shares.

Or you might have a situation where par value was $50, and the book value, or the value as shown on the books might be a different figure entirely.

I suppose there is another value, aside from book value, [1931] and that is, in fact, actual value, and that might be different from what the books said and might be different from what the par said.

I think it was partly because of the fact that this term "par value" of shares may have misled some people that there was a tendency to have shares with no par value, just say there is no par value on the

(Testimony of Robert Hodge.)

share. The share was, therefore, either worth what the books showed, or it was worth what you could trade it for across the counter. Or if it was listed on an exchange, what you could sell it for on the exchange. So the shares with no par value are just what they mean, there is no par value fixed.

What is the value of the share?

Well, if you are going to buy or sell it, it is what you can get for it on an exchange or across the counter. Or you might, in some situations, look to a book value, what do the books show the assets of the corporation are worth, divided by the number of shares, to show what each share is worth.

Then you have got problems, when you look at book value, of what are the actual values.

Maybe they have got a trade-mark in there set up at $1.00, which you wouldn't need to worry about. But if they have a trade-mark set up at one million dollars, then you have got to stop and see whether the trade-mark is worth that. [1932]

Good will is another thing that on the books might take shares up or down, depending on how it was set up.

That is generally, without reference to this case, what we mean by par value shares and no par value shares.

Is there any objection to that general statement?

Mr. Strachan: I have none.

The Court: All right. Go ahead, Mr. Strachan.

Mr. Strachan: We gave you a copy of these when they were marked, Mr. Dixon.

(Testimony of Robert Hodge.)

The Court: No. When these were marked, they were marked out of a book, counsel.

Mr. Strachan: We thought they were furnished with a copy.

Q. (By Mr. Strachan): Along the line that his Honor was discussing, you agree, do you not, that the book value of a share may be quite different from its actual value?

A. It could be very much different.

Q. The actual value might be higher or it might be lower? A. That is true.

Q. Now, if a corporation were to add, by writing up, an assigned value to its assets on its books, simply changing that assigned value on the books between yesterday and today, it would change the book value, would it not?

A. It certainly would. [1933]

Q. But it would not change the actual value, would it?

A. It might give recognition to a change in actual value which had taken place.

Q. But it wouldn't change the actual value of the stock, would it?

A. No, it would not change the actual value of the stock.

Q. Now, referring to this Exhibit A-1, which is——

The Court: For identification.

Mr. Strachan: I would just as soon offer it in evidence, your Honor, if I haven't already done so.

The Court: A-1 received in evidence.

(Testimony of Robert Hodge.)

I just want to keep the record straight.

Mr. Strachan: It would simplify it to offer it in evidence.

The Court: A-1 in evidence.

The Clerk: Shall I mark all the copies in evidence?

The Court: All the copies.

The Clerk: That will be 15 copies.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A-1.)

Q. (By Mr. Strachan): Do you recognize Exhibit A-1 as a copy of a balance sheet, and other data, prepared by your firm as of the date of the transfer of the business from the partnership to the corporation? [1934]

A. Yes, sir, I believe it is. I don't have any papers with which to compare it, but it certainly looks like our style of preparation of a balance sheet. It has our watermark on the left-hand side. I would say it is probably a copy of a report or part of a report that we rendered at that time.

Q. I think you will find 240 dollars——

The Court: $240,000.

Q. (By Mr. Strachan, continuing): $340,697.22 as the next to the last figure on A-1, do you see that?

A. Yes.

Q. That is identical with the figure that is shown as the stated value of the thousand shares of stock on Exhibit 60, is that not correct?

A. That is correct.

(Testimony of Robert Hodge.)

Q. So that A-1 shows the origin or derivation of the capital stock stated value in the balance sheet Exhibit 60?

A. It shows the basis for the valuation of the thousand shares of no par stock, which were issued by the corporation. [1935]

Q. Now, referring to the assets side of Exhibit A-1, the assets, it shows cash on hand $100 and other current assets bringing total of current assets up to $48,710.93. Do you notice that? A. Yes, sir.

Q. And on the liabilities side, the current liabilities side, you have $77,678.96. A. Yes, sir.

Q. So that there was a deficiency in current assets of the business at the time the corporation took over. I believe you said normally that was not a satisfactory condition? A. Yes, sir.

Q. Under the fixed assets on the left-hand side of the balance sheet, you have land, buildings, and so on, coming down to a total figure, and then extended out after depreciation, and there are two columns there, one cost and the other appraised value. Will you tell us what is the difference between the cost column and the appraised value column?

A. The cost column would represent the actual amount of cash and/or indebtedness incurred in the acquisition of these assets.

The appraised value would be the value that was set on these assets as of a certain date by some appraiser—in this case probably it was Union Appraisal—as to their [1936] best judgment as to the sound value of these assets.

(Testimony of Robert Hodge.)

Q. In setting up the books and records of Winckler-Smith company, you put on the books the appraised value and disregarded the cost value of those assets, did you not? A. That is true.

Q. You show at the foot of the assets column total value of three hundred thirty-two thousand some odd dollars as the total assets.

Of those total assets, isn't it a fact that they are represented by $29,000 approximately of partnership undistributed earnings, and only $62,000 paid in cash by the partners, and $91,000 represented by assets bought on credit for which the creditors hadn't been paid? A. Have you finished, counsel?

Q. Yes, sir.

A. I don't think that is a fair statement. How would $330,000 assets be represented by a liability? I don't follow your line of reasoning.

Assets are represented by fixed items you can get your hands on, like your buildings, your cash in the bank, your inventory, and your deferred items. They are not represented by a liability.

Q. Well, let's put it this way. How much had been contributed in cash?

A. As the statement shows, the three partners had [1937] contributed a total of $62,000.

Q. In addition to that, there was contributed some undistributed earnings of the partnership, is that a fact?

A. That is true, of approximately $28,000 or $29,000.

(Testimony of Robert Hodge.)

Q. And $150,000 was represented by this write-up of the assets by $150,000, is that correct?

A. I am sorry, but what do you mean by represented by?

Q. 150,000 of the total stated assets of 332,000 resulted from the write-up—— A. That is true.

Q. ——of $150,000 above cost.

A. That is true.

Q. All right. Now, down at the lower right-hand corner is a tabulation which shows the manner in which the $150,000 was apportioned among the three partners, Goodland, Smith and Winckler, is that correct? A. That is true.

Q. As to Goodland, it shows Goodland made an original investment of $12,000. Do you know in what form that was made? A. No, sir, I do not.

Q. In the write-up Goodland was given only $720, is that not correct? A. That is correct

Q. So that Goodland, who had put in nearly one-fifth [1938] of the total original capital, was given the benefit of only something less than one per cent, about one-half of one per cent of the appraisal write-up? A. That's right.

Q. Now, as to Smith, Smith put in 40,000 to begin with, is that correct?

A. The figures show that. I don't know. I didn't have anything to do with the books at this time. I started after this balance sheet.

Q. You don't doubt that the——

A. No, I don't doubt the figures. But you asked me, did he put in 40,000 in cash? I don't know.

(Testimony of Robert Hodge.)

Q. You say that because this statement that appears down there was prepared by Mr. Moore, rather than yourself? A. That is true, sir.

Q. Presumably Mr. Moore——

A. Mr. Moore doesn't say invested cash at all.

Q. What's that?

A. He doesn't say these figures are all cash, at least from this balance sheet.

Q. At least Mr. Smith was credited with $40,000 of original contribution? A. That is true.

Mr. Dixon: I rise to object to any further questioning along this line by counsel. I don't know what the purpose or [1939] object of it is. It seems to me that it clearly has no relevance to any of the issues of this lawsuit and will not tend to prove or disprove any of them.

I might say I don't see how it can possibly make any difference what the arrangement was between the partners and other persons when this corporation was formed, what the stock arrangement was between them. It is a matter of their own discretion. There wasn't any public offering.

The Court: I think it is pretty remote, but I am not going to cut counsel off from some reasonable cross-examination. However, we will not have a lot on this matter, because it is very remote to the issue.

Let me ask one question, if you know. These different amounts that were credited to the three partners or to the men who had been the partners and who now became the shareholders, in the three varying amounts, was that by agreement between them?

(Testimony of Robert Hodge.)

The Witness: I would assume so, your Honor.

The Court: You don't know?

The Witness: I don't know, no, sir.

The Court: You don't know, then, why Goodland got 720 and Smith got 39,000?

The Witness: No. I don't know. It was simply a matter of agreement among them.

The Court: If they would agree in setting up the corporation, [1940] then the accountant would set up the books on the basis on which they agreed?

The Witness: That's right.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): You don't know in what form the contributions by Smith were made?

A. No, I do not, sir.

Q. But it does show, does it not, that Smith, having contributed what was apparently 65 per cent of the original capital, was credited with only 26 per cent?

Mr. Dixon: Now, if the court please, I certainly object to this question and any further examination along this line. I can't possibly see how it would have any relevancy to any issue in this case in any respect.

Mr. Strachan: I have four more questions, your Honor.

The Court: I have indicated I think it is remote, but I am going to let him complete what he is doing here. The objection is overruled.

Q. (By Mr. Strachan): So that his investment

(Testimony of Robert Hodge.)

of $40,000 by the write-up was made to appear about 80,000, is that correct?

A. It was not made to appear, counsel. It was actually done.

Q. Yes. A. According to the books. [1941]

Q. Through the write-up?

A. Through the write-up.

Q. Yes.

The Court: By the write-up, you mean the appraisal that was made of the fixed assets and carried into the books?

Mr. Strachan: The addition on the books of $150,000.

The Court: As a result of an appraisal.

Mr. Strachan: On the basis of the appraisal, that is correct.

Q. Now, as far as Winckler is concerned, his original investment was 10,000, as shown on the tabulation, which was increased by $109,000 through the write-up we have mentioned, which resulted in his having a credit on the books of the corporation for capital contribution of over 140,000, is that correct.

A. No, sir. The books show that for capital contribution he only made 10,000. He was credited with 109,000 some odd dollars by the increase in the value of the assets due to setting up the appraised values. He also had accumulated some 16,000 odd dollars in excess of earnings over withdrawals.

Q. That is correct.

A. It is not a capital contribution, though, counsel.

(Testimony of Robert Hodge.)

The Court: It was used, however, as the basis for the issuance of shares to him? [1942]

The Witness: That is true.

Q. (By Mr. Strachan): So that for his $10,000 and his 21,000—his 10,000 original contribution and his 21,000 of undistributed earnings, he was given 140,000——

A. 135,000.

Q. ——135,000, and that made him over 50 per cent holder of the common stock, is that correct?

A. That is true. That is the basis on which the stock was issued.

The Court: We will take our recess, but before we do, I think I should orient you as to the materiality of counsel's questioning.

Plaintiff claims it was hurt, damaged by wrongful acts.

The defendant contends, first, we committed no wrongful acts and, secondly, we didn't damage you, and, thirdly, if there was any damage, we want to show what the corporation was that we damaged.

Is that right, generally?

Mr. Strachan: I think that is a good summary.

The Court: Therefore, this line of questioning, which probably will be carried on through various of these statements, has nothing to do with whether Winckler made a good deal or a bad deal with Smith. That is not an issue in this case. We don't care whether he robbed Smith or whether Smith gave him more than his share, or whether he

(Testimony of Robert Hodge.)

earned [1943] this amount that he got in shares. That is not in issue.

The materiality of this goes eventually to the question, and all of this should be kept in mind, in connection with the ultimate question, what was this corporation doing and what was it like in 1951? That is when the corporation claimed it was damaged.

Therefore, just as the plaintiff has been entitled to show sales the corporation made that year in introducing statements, so the defendant will be entitled to show that they didn't make the sales, they didn't have the assets they claimed that they had, or that they were already broke and couldn't have gone on anyhow. In other words, inferences from facts that might or might not be drawn from the various situations.

So in this line of questioning that will go on, we are largely concerned, and I am not going to close the door, that there might not be some other admissibility of all this, but we are largely concerned in ultimately deciding, trying to find facts as to what was this corporation like in 1951, the year it claims it was injured.

Do you accept that statement?

Mr. Strachan: I think it is a correct statement, yes, sir.

The Court: So while counsel is entitled to go into some of these things, I don't want you diverted from the main issue in the case. We are not concerned with how these three men agreed among themselves.

(Testimony of Robert Hodge.)

That is not in issue. It may have [1944] some bearing in deciding the later issues, but that is not the question to be decided.

If you would decide all the little fringe issues in this case, you would be here until next Christmas.

Remember the admonition of the court. You will be excused for a short recess.

(Recess.)

The Court: The record will show the jury present. Proceed.

Q. (By Mr. Strachan): Mr. Hodge, was there a covering letter or report prepared that accompanied Defendants' Exhibit A-1, which is the balance sheet of January 31, 1946?

A. I do not know, sir. I have not the papers that far back with me and I couldn't say. I would assume normally there would be notes with a report. It is not always done, but it is normally done.

Q. Is there any way in which you can fix from your files what the date of the preparation of this balance sheet was?

A. Certainly not with what I have in the courtroom, not the papers I have in the courtroom.

The Court: Here is a letter in the file, counsel, that immediately precedes. This is your file marked A for identification.

Mr. Strachan: Yes, sir. [1945]

The Court: It immediately precedes the balance sheet.

Mr. Strachan: How can I have this marked?

(Testimony of Robert Hodge.)

The Clerk: It would be A-7, your Honor. We have marked 6 already.

The Court: A-7 for identification.

(The exhibit referred to was marked Defendants' Exhibit A-7 for identification.)

Q. (By Mr. Strachan): I show you the letter that has been marked A-7 and ask you if you can tell us whether or not that is the letter which accompanied the document marked A-1?

A. Yes, sir, that is a copy of the letter which accompanied the balance sheet, your Exhibit A-1.

Q. That is a letter dated February 22, 1946?

A. No, sir. It is dated February 25, 1946.

Q. That's right. Thank you. It is not Washington's birthday.

Do you know whether that balance sheet was prepared before or after the appraisal report by Union Appraisal Company?

A. I do not know, sir.

Q. Now, referring again to Exhibit A-1, fixed assets, the land, buildings, machinery and equipment, being the first three items in the cost column, total approximately $106,000, is that correct?

A. That is correct, sir. [1946]

Q. Mr. Winckler testified that he bought the land, buildings and machinery for a total cost of $64,000; you are aware of that, are you not?

A. I am not aware of that, sir.

Q. Well, assuming that he did pay $64,000 for it, for those three items, to what would you attribute the increase from $64,000 to $106,000?

(Testimony of Robert Hodge.)

A. During the time from the date of the purchase of the plant by Mr. Winckler, I would assume that the difference had been expended for the items shown on the balance sheet.

Q. That would be roughly 42,000?

A. Approximately, yes, sir.

Q. Would you be able to tell us whether that was on land, buildings, or machinery and equipment?

A. I would not be able to tell you, no, sir.

Q. Mr. Winckler testified that of the $64,000 he spent on land, buildings and machinery, approximately $7,000 was the value of the machinery and equipment which he said, I think, was a stainless steel tank and a shell of a boiler.

The Court: This is equipment, you say, that he purchased originally?

Mr. Strachan: Yes. He thought that the equipment he originally bought, included in that $64,000 purchase, had a value of about $7,000. [1947]

Mr. Dixon: Counsel, I don't recall that testimony. You may be right.

The Court: There was some testimony to that effect.

Counsel, this is very remote, unless you want to tie it in with 1951.

I think your recollection is correct that when Winckler bought this plant there was a bunch of equipment which he says he had to, as I recall, junk or get rid of, except the two items you mentioned; and whether he testified they were worth that or not,

(Testimony of Robert Hodge.)

I am not sure, but they were set up with that value.

Mr. Strachan: $7,000.

The Court: Something like that, yes.

Q. (By Mr. Strachan): Now, assuming that the machinery and equipment originally purchased was set up for $7,000, then the cost column here would indicate that there had been in a seven-month period of partnership operation an increase in the machinery and equipment of about $82,000, is that correct?

Mr. Dixon: If the court please, I don't think there is any evidence in here to support that assumption.

What does counsel mean, assume that it was set up at $7,000?

Is there a particular figure here on this Exhibit A-1 that relates to that, counsel? [1948]

The Court: The objection is sustained.

This witness doesn't know. It is speculating on his part.

Q. (By Mr. Strachan): Well, assuming that the machinery and equipment that was originally purchased was set up for $7,000, and that seven months later the cost was reflected on the books and records as $89,000, would that not indicate that during the seven months period there had been new equipment purchased in the approximate amount of $82,000?

Mr. Dixon: If the court please, I am going to register an objection at this time on the same grounds that I made it before. I fail to see where these questions, and particularly the assumption that counsel makes, which is so far wholly unsup-

(Testimony of Robert Hodge.)

ported, to my knowledge, with any books or records —that this line of questioning is wholly irrelevant and immaterial and remote to any of the issues in this lawsuit. It does not tend to prove or disprove any of them.

The Court: Objection sustained.

Q. (By Mr. Strachan): Can you explain, Mr. Hodge, why it is that on this statement the land and buildings are set up for less than $18,000 when the original cost was approximately $64,000?

A. No, sir, I cannot.

The Court: Counsel, this is the trouble with being remote. As I recall the testimony, the $64,000 was what he [1949] paid for land, buildings and machinery. Is that your recollection? And your question said land and buildings.

Now, here is a witness who doesn't know about this, and you give him a supposition which I don't think is correct.

As I recall—and this is subject to correction—he said originally $64,000 is what he paid for land, buildings, and this equipment, most of which he didn't keep.

Mr. Strachan: I believe that is right.

The Court: Then your question was improper.

Mr. Strachan: May I look at the record for just a moment?

The Court: Yes.

Mr. Strachan: Your Honor, I just wanted to say that when Mr. Winckler was on the stand your Honor put a question to him, which I thought was

(Testimony of Robert Hodge.)

very appropriate, and I didn't think we got an answer, and that is why I put the question to this witness.

Your Honor said: Then why is it that the land and buildings are set up for less than $18,000 in your cost column when you testified that you paid $64,000 for it?

I think perhaps both you and I omitted to take into account, then——

The Court: We fell into the same error.

Mr. Strachan: Yes, sir.

The Court: Don't misunderstand me, counsel, I am not [1950] critical; I just want to move this case along, and here is an issue that is pretty remote, and I sustained a previous objection. This one was not objected to.

Any colloquy between counsel is no concern of yours. The Judge is just another lawyer who by the grace of God sits on the bench. He doesn't know any more than these counsel know. And as you have seen around here, he sometimes knows a little less. So he has to struggle along with our problems.

Mr. Strachan: I do want to say on the question of remoteness, your Honor, that I don't see it just that way, because in my view of the case, to the extent that the books were made to show values which were non-existent, I think we are dealing with a very real issue in this case.

The Court: I am not going to limit you——

Mr. Strachan: This is a matter of tracing out what the real value, realistic value of the assets is.

(Testimony of Robert Hodge.)

The Court: I am not going to limit you on a statement of 1951, to go down and see what assets there were.

Mr. Strachan: Of course the assets as they eventually showed up at three-quarters of a million dollars in 1951, were based upon successive appraisals and reappraisals and alterations of book value, without changing the real value, and that is what I am trying to show.

I am trying to go back to the beginning and trace what [1951] the real value of those is, to show how little of the three-quarters of a million dollars was the real value.

The Court: Your question had nothing to do with the value of anything. This witness didn't know. You were making some comparison about this $7,000 tank, or something, plus the fact that this report shows other machinery and equipment apparently purchased. This witness doesn't know whether it was purchased or not.

There are inventories that are available from this company's records of its physical assets.

You can have unlimited right to show what the assets of this company were in '51. And if it becomes material to ascertain, I certainly will permit you. I permitted you to go back to show the original basis of the $240,000 stock value, because it was carried over. We are just quarreling about a particular question that I think both of us realize isn't the heart of this case.

(Testimony of Robert Hodge.)

Mr. Strachan: I would like to clear up the question which the court put and I put, by amending the question that you put and I put to take into account that $7,000.

The Court: How much time are you going to spend on this? Is this about the end of it?

Mr. Strachan: This is the end of that write-up at that point, yes.

The Court: Put your question. [1952]

Q. (By Mr. Strachan): Can you tell us why, Mr. Hodge, when $84,000 was paid for the plant, the buildings, and about $7,000 worth of machinery——

The Court: Now, counsel, wait a minute. That doesn't reflect what is in this record.

Again, your recollection and mine—you say about $7,000 worth of machinery. $84,000 was paid for a lot of machinery, which——

Mr. Strachan: Had a value.

The Court: It may have had a value to somebody, but it didn't have a value to Winekler. How much of that $84,000 was paid for that machinery we don't know, but we do know that when Winekler got done he said he kept the tank.

Mr. Strachan: He said he set up $7,000 for the tank and the boiler.

The Court: Something like that.

Mr. Dixon: If the court please, in view of this line of questioning, counsel knows that there is an appraisal of all of the equipment here, which lists it piece by piece, as of March 18, 1946, which shows

(Testimony of Robert Hodge.)

the basis of this statement, and counsel has had this and it has been available to him.

We did not put it in the record because we put the appraisal of 1949 in the record.

It seems to me that this line of questioning is wholly irrelevant and immaterial to the issues of this lawsuit. [1963]

The Court: We will mark for identification this appraisal, give it a number so we will know what we are talking about. It will be a plaintiff's number.

The Clerk: Plaintiff's Exhibit 68 for identification.

Mr. Dixon: All right. 68 for identification.

The Court: All right.

(The exhibit referred to was marked Plaintiff's Exhibit No. 68 for identification.)

Mr. Dixon: The reason for this, your Honor, is this is the record, and counsel is assuming that there wasn't anything here but a shell, in his question to this witness, just a few tanks.

The Court: All right, now. We will argue the case later.

Mr. Strachan: Is this in evidence?

Mr. Dixon: No.

The Court: It has just been marked, counsel.

Mr. Dixon: I am informing you that it is available.

The Court: Since Mr. Dixon brought it up, we gave it a plaintiff's number. If you want to put it in evidence, we will give it a defendants' number, or if

(Testimony of Robert Hodge.)

you want to study it over, you may make up your mind later.

Mr. Dixon: If you have no objection to it, I will offer it in evidence, counsel.

Mr. Strachan: I think that is the easier way to do it. [1954]

The Clerk: Plaintiff's Exhibit 68 received in evidence.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 68.)

The Court: What is the date?

Mr. Strachan: Appraisal dated March 18, 1946, stamped received April 8, 1946, by Winckler & Smith Citrus Products Company, and it is entitled Appraisal Land, Buildings, Machinery and Equipment, Union Appraisal Company.

The Court: All right. Let me look at it.

(Exhibit handed to the court.) [1955]

Q. (By Mr. Strachan): Mr. Hodge, it is a fact, isn't it, that the balance sheet showing the $150,000 write-up of physical assets which was furnished to Winckler-Smith on February 25, 1946, showed those write-ups prior to the date of the Union Appraisal Company appraisal on March 18, 1946, received April 8, 1946, by the company?

A. I do not know, sir.

Q. Now, if you will refer again to the Exhibit 60, just below—withdraw that.

Of the capital stock shown on the third page of

(Testimony of Robert Hodge.)

Exhibit 60 as $240,697.22, $150,000 of that amount was based upon the appraisal write-up of $150,000, is that correct?

A. No, sir. This value is set up on the basis of the declared value of a board of directors' meeting which declared the value of the stock to be so many dollars, some $240,000. The basis for setting this up has nothing to do with the partnership books. It was probably arrived at from the amount carried forward, but the basis for the entry is based on the board of directors' meeting and authorization.

Q. They authorized it, but the authorization took into account $150,000 of value in excess of the values at which the same assets were carried on the books of the partnership?

A. I do not know that, sir. The only thing I know is that the board of directors authorized the capital stock to be set up at this particular value. What they took into [1956] account, I don't know.

Q. And you don't know, beyond what the board of directors said was the value of the assets, what the value of those assets was, then?

A. No, sir. The corporation books were set up on the basis of a board of directors' meeting, minutes of stockholders' meetings, too. Pardon me for my oversight.

Q. On Exhibit 60, you show that as of January 31, 1949, there was a capital deficit of $224,852.56, which you said had various components and was a net figure? A. That is true, sir.

Q. Have you with you records from which you can tell us the components that entered into that net

(Testimony of Robert Hodge.)

figure, how the deficit as of that date occurred, that is?

A. No, sir, I cannot readily give you the component parts of that deficit. The reason for that is that the records during the Chapter XI proceedings were not made available to us. We had to build them up as best as we could from the trustee's report and documents like that. I am sorry, but they are just not in shape to read them off.

Q. With the exception of this period, do you have the date upon which the deficit was aggregated? A. It is a very complex figure.

Q. I don't want to make this any more complex than it is. I would like to keep it simple. Could you tell us [1957] for the first year operation, that is the year ended January 31, 1947, whether there were any——

A. In the year ended January 31, 1947, there was a deficit of $11,771.34.

Q. What was that deficit due to?

A. That was the loss from operations during the year ended January 31, 1947.

Q. Now, for the year 1948, were there any items that entered into the——

A. I do not have the reports here. [1958]

* * *

Mr. Strachan: I will offer Exhibit A-4 in evidence then.

(Testimony of Robert Hodge.)

The Court: Exhibit A-4 received in evidence.

* * *

Q. (By Mr. Strachan): Can you, by referring to Exhibit A-4 or A-5, tell us what items entered into the capital deficit?

A. Reading it from the balance sheet as of January [1959] 31, 1948, the deficit comprised the following: Deficit at January 31, 1947, $11,771.34; loss for the year ending January 31, 1948, $72,221.88, a total of $83,992.62.

There were some surplus adjustments, reduction in the market value of inventory, of $47,849.12. A reserve for damaged merchandise, $5,000. There was a decrease in the reserve for doubtful accounts of $1,500. Which made a total deficit of $135,341.74.

Q. Mr. Winckler testified with respect to the year ended January 31, 1948, he understood that the inventory write-down, $48,000, was included in the operating loss of $72,000. If he so testified, he was in error in that respect, was he not?

A. He was.

Q. So that the total loss due to damage and inventory write-down and operation for this year was about $125,000, is that correct?

A. The total increase in the deficit was about $124,000, that is correct.

Q. So that gave a total of how much deficit as of the end of 1947?

A. The deficit, January 31, 1948, was $135,341.74.

Q. On your Exhibit 60, you show a deficit at

(Testimony of Robert Hodge.)

January 31, 1949, of $224,852.56, that is near the bottom of the page. A. Yes, sir. [1960]

Q. That would indicate an increase in the deficit between the year ended at that time and the year ended the year before of about $105,000, would it not? A. About $109,000, did you say?

Q. I think I said 105. Which would be right?

A. Approximately $109,000. That is in the year and a half period from January 31, 1948, to July 31, 1949.

Q. I am not talking about July of 1949. I am talking about January 31, 1949.

A. I beg your pardon.

Q. Deficit of January 31, 1949. A. Yes.

Q. So that is an increase of about $109,000 in that period? A. Yes, sir.

The Court: It would be about 90, wouldn't it?

The Witness: That's right, 90,000. Well, wait a minute. Let me get this straight.

The Court: 135 to 224.

The Witness: Right. It would be about 88,000.

Q. (By Mr. Strachan): Are you able to explain $88,000 increase in the deficit in that period?

A. Well, we were not furnished the records of the trustee and we simply went in with Mr. Winckler and his staff's assistance and took an inventory of all assets there [1961] were at the termination of Chapter XI proceedings, and set our records from there. Well, this 224 is approximately—not approximately, that is a poor word—it is the difference between the assets that we had and what we

(Testimony of Robert Hodge.)

wound up with after Chapter XI to balance the books, in effect.

The Court: When you came out of that receivership, the corporation no longer actually owned the real estate?

The Witness: They owned very little. There was a few inventory items, wooden platforms, I forget the correct name for them, and a few inventory things like that, and that was all that was there for them to start business with again. [1962]

The Court: Plus the option to repurchase?

The Witness: Plus the option to repurchase.

The Court: At $1.00?

The Witness: That is true.

The Court: Did that have anything to do with the increase in deficit?

The Witness: Yes. At January 31st, '48, we had certain assets. Those assets were liquidated——

Q. (By Mr. Strachan): I thought the assets were liquidated in March of 1949, and you showed the deficit here at January as $224,000, which is three months prior—two and a half months prior, I should say, to the loss sustained on the sale of the plant.

A. As I pointed out to you earlier, counsel, this statement purported to be a statement of the company only. It did not purport to take into account any transactions that the trustee had made prior to the termination of Chapter 11 proceedings.

Q. Now, January 31, 1949, the company owned its property, didn't it?

(Testimony of Robert Hodge.)

A. That is a technical question.

The Court: That is a legal question.

Wasn't that the period of reorganization?

Mr. Strachan: It was during the reorganization, yes. The assets hadn't been sold. [1963]

The Court: Well, go ahead.

Q. (By Mr. Strachan): Mr. Hodge, am I to understand that the $224,000 deficit, stated as of January 31, 1949, included as one of the components the $169,000 loss which was involved in the sale in March of 1949, of the plant?

A. It would, yes, sir.

Q. And you included it in the January 31st statement, although the transaction had not then occurred?

Mr. Dixon: Counsel, I think that is a wholly misleading question, your Honor, and I object to it on that basis. This witness has already testified that this statement was made up——

The Court: All right. Overruled. Let him explain it again.

Read the question.

(Question read by the reporter.)

The Witness: That is true.

The Court: In other words, you were having to reconstruct what went on during the period of time when you weren't keeping the books, when someone else was in charge of the corporation?

The Witness: That is true.

The Court: And from that period of time there

(Testimony of Robert Hodge.)

floats up certain results. You were able to find out what some of the results were and then you arbitrarily went back and reconstructed [1964] something for that period?

The Witness: We reconstructed the books.

Q. (By Mr. Strachan): Can you tell us whether there were any items—I will back up a little bit.

If at the end of January 31, 1948, you had a capital deficit of $135,000, then you recorded as of a year later a loss of $169,000, that would have shown debit items of about $304,000 or a total of $304,000, after reflecting the $69,000 loss; isn't that correct?

A. $169,000.

Q. Isn't that correct?

A. Well, in this $224,000 figure is our reconstruction of all of the transactions that went on during the period of trusteeship.

Q. That is what I am trying to get at. You had a 135 deficit item and there was an additional deficit item of 169,000 loss? A. That is true.

Q. So those two standing by themselves would have indicated a $304,000 deficit before any credit items were entered, is that correct?

A. Before any other transactions that we picked up during the Chapter 11 proceedings, that we picked up from their reports and other sources of information that were made available to us. [1965]

The Court: Which might influence the final figure?

The Witness: It certainly would, sir.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Can you name any such transaction that you picked up?

A. Yes, sir. The trustee's report showed an operating profit of approximately $50,000. That was one of the items.

Q. Were they any other items that you can recall?

A. There would be all of the items that were reflected in the trustee proceedings. In other words, we had debt cancellations.

Q. How did you deal with that debt cancellation?

A. As I explained to you earlier, counsel, we had so many assets and so many liabilities at the last balance sheet, which was the January 31st, '48. We now are finished, or the termination of the trustee proceedings, we have so many assets, we balance out our balance sheet by the operating deficit as the balancing figure.

Q. In that Chapter 11 proceedings——

The Court: I am going to sustain an objection on the court's own motion to any further inquiry into that matter.

If you want to go into what assets the corporation had when it came out of this Chapter 11, you can go into it in detail. I am not going to go into how a CPA reconstructed from what he could find out what went on during that period. [1966]

It has no bearing on the issues of this case whatsoever. If you want to start in with what the corporation had when it came out, you can do that, Mr. Strachan.

(Testimony of Robert Hodge.)

What happened or what might have happened in the bankruptcy reorganization has nothing to do with the matter, except the final result, what did the corporation come out with, what did it have?

* * *

The Court: The record will show the jury absent.

I think the defendants have a perfect right to show what the corporation had in assets, describe its condition in 1951. To a limited extent I will permit cross-examination or other inquiry to go back where, as in the case of capital stock, you have a figure carried over and it is necessary to show what it was.

Now, this corporation comes out of reorganization, it lost certain assets in reorganization, it got some credits, it occurs to me that I probably can understand what went on, [1967] but it is not material. There were some debts paid in full, other debts were scaled down, they only paid part of their debts. Obviously, their accounts payable would be decreased, which would affect this situation. There was a loss on the land, which would affect it. The receiver made some money, which hasn't anything to do with this. You, yourself, would take the position that the fact that the receiver made money didn't have anything to do with whether this corporation could make money. So, then, the question really comes down, logically, to what did they have when they came out of reorganization.

Where it is necessary to go back, as in the case of stock, to explain it, it will be proper. I am not going

(Testimony of Robert Hodge.)

to spend a lot of time and have this jury mixed up over what went on in this reorganization proceedings.

It sort of makes me think about—not the three goats, but about the fellow who comes into court and says, "You hit me on the nose," and the defendant comes in and says, "Well, I don't want to talk about that right now, but you were a very sick man when I hit you, your legs weren't very good when I socked you, you toppled over awfully easy."

I take it the defendants have other positions and contentions besides the condition of this plaintiff. You have certainly a right to show what this corporation was. Your defense is multiple. We didn't damage you, we didn't conspire. Even if we did damage you, what were you at the time [1968] we damaged you?

Well, that is essentially, what were you in 1951?

We are only concerned with previous matters in order to explain what this corporation was in '51.

Mr. Strachan: Of course, your Honor, their end balance sheet showed quite a lot of value there, after they write those assets up several times, and you have got to show that included in that were not only the write-ups due to appraisals of property, but you also have to show that they added in, to get that net worth, forgivenesses of indebtedness, and that sort of thing.

That is what I was trying to do.

The Court: You have covered, in part, that, and you will be entitled to go in and show the items that

(Testimony of Robert Hodge.)

changed it. But let's not spend any more time on what went on in the reorganization, because obviously——

Mr. Strachan: I would like to show what the liquidation of their liabilities, without payment—how that affected their balance sheet position. I was just getting to that with this witness.

The Court: How would that affect it? It affects the net result, but what difference does it make——

Mr. Strachan: I want to show that forgiveness of indebtedness as it was reflected on the books directly increased the net worth, just as if there had been some added [1969] capital, and there was no added capital.

The Court: Most of my concern about this is the length of time it takes.

Can't this be done? For instance, you have established a figure of one hundred thirty-five, January 1st, '48, a year later it is two hundred twenty-four. We have got $88,000 difference. You had a loss of one hundred sixty-nine in the sale of the land, the trustee made $50,000 in operating, there was——

Mr. Strachan: I don't see how that $50,000 that the trustee made in operating gets into the corporate books, myself.

The Court: It would get into the books in figuring the deficit.

Witness Hodge: It does in this way: that there were funds left to the corporation which wouldn't have been otherwise left to it.

Mr. Strachan: As I understood it, the money

(Testimony of Robert Hodge.)

made by the trustee, together with what was realized on the liquidation of assets, was applied to the pro rata payment of creditors that weren't paid in full.

I don't see how the 50,000 ever gets into the corporate income.

Witness Hodge: It would in this way: Supposing under the plan—— [1970]

The Court: Just a minute. You say it does?

Witness Hodge: It could.

The Court: Do you know whether or not it did?

Witness Hodge: I know there was some cash turned over to the corporation after the trustee proceedings were terminated.

The Court: The inquiry would not be whether the accountant did it rightfully or wrongfully. He could have made the most colossal mistake in the world. The question is what did they take into account in arriving at the two twenty-four, if you are right that you can even go into this. It isn't whether it is right or wrong. The question is did they take it into account. It seems to me this is an issue that you could almost—— [1971]

Mr. Strachan: If Mr. Hodge took into account $50,000 of operating profit that the receiver had and credited that to the corporation, it seems to me he ought to say that, because I can't understand how that could properly be done, because the income to the receiver together with what results from the liquidation of assets goes to meet the costs and meet the pro rata distribution through

(Testimony of Robert Hodge.)

the receivership. I don't see how in the world he can take 50,000 of the receiver's operating profit into effect in his capital surplus.

The Court: Well, let's analyze that a minute. The receiver, as I remember the testimony, made a gross of more than 50,000, because he paid operating expenses as he went along, right? And he wound up with some kind of profit. Is that what the testimony shows?

Mr. Walker: That is correct.

The Court: Where the receiver has made a profit, this is not a bankruptcy, and that is why I stopped and said nothing more when you were talking about whether this corporation still had this property, I was thinking of it as a bankruptcy, where it would be another entity owning it, but actually it still owned its property, although it was under control of the court. If the receiver makes $50,000, what is to be done with the $50,000?

Because the receiver made it, he can't stick it in his pocket. He was acting for the corporation. It therefore was [1972] eventually to become corporation property and it would therefore be used to pay off debts or obligations of the corporation or for such purposes as the corporation might want to use it. If you can convince me the receiver made $50,000 and he can stick that in his pocket apart from the business affairs of the corporation, I might go along with you.

Mr. Strachan: I don't say he did that, but I do say until the expenses and debts of the corporation

(Testimony of Robert Hodge.)

were paid in full through that receivership, that the trustee couldn't turn $50,000 profit or any other sum of profit over to the corporation. He had to apply that to pay the expenses and the debts. If he paid less than 100 cents on the dollar, if he turned it over to the corporation so Mr. Hodge could put it in the income account, I would say he was wrong. I don't think he did it.

The Court: I am no expert in accounting, but I would guess that is the way it would have to be reflected.

Mr. Strachan: We have Mr. Walker here. Why don't we ask him? Did you turn over the $50,000?

The Court: He was not the receiver.

Mr. Walker: I will give you a short and quick answer to that. I was not the trustee. I would suggest that this is a matter we could discuss over the noon hour. I think there is a very simple explanation

The Court: If we can get an explanation of this deficit [1973] and what was done, we will let you go into it. A company goes into receivership, not bankruptcy, and it contemplates coming out. This one did. You have to adjust the books afterwards to take account of this situation.

Mr. Strachan: Basically, what is wrong here is that they didn't set up the corporation books as of the date that they came out of the bankruptcy. They set up the corporate books to show ex post facto, that is on January 31, 1949, when they were

(Testimony of Robert Hodge.)

in bankruptcy, that the loss was sustained, that the debts were liquidated for less than their face amount, and it didn't happen that way at all. That is what is wrong with those balance sheets and income accounts.

If they had set those up as of the date of the conclusion of the bankruptcy, instead of setting up a hypothetical situation and assuming that the year before these transactions happened, we wouldn't be in this state.

The Court: I think the receiver or trustee in reorganization is acting for the owner of the property. He is the custodian while it is being reorganized. Therefore, if a piece of property is sold and a loss is taken, it has got to be set up. If he made money, it has got to be considered income in the final adjustment of the matter. If he paid off debts at less than 100 cents on the dollar, then proportionately there was an increase in the value of the corporation, because it was able to pay its debts at less than 100 [1974] cents, and where it had 100,000 of accounts payable, maybe now it has only 75,000.

I don't know how else you can do it, unless you come out of the bankruptcy and have a reappraisal and set up a new set of books and start fresh.

Mr. Strachan: That is what is ordinarily done.

The Court: I doubt that. Richfield was in reorganization here for years, and I doubt if that is the way that was handled.

Mr. Dixon: May it please the court, counsel is

(Testimony of Robert Hodge.)

mistaken and is completely in error. This Exhibit 60 does not purport to represent anything except the operations of the company after the termination of the trusteeship and, of course, while it necessarily must—being a continuing corporation—show the stock setup, it seems to me that——

The Court: Counsel is just talking about this one matter here, the deficit at January 31. The witness admits that was an arbitrary date picked because he didn't have access to the books.

Mr. Dixon: That was the end of the fiscal year, if you recall, your Honor. The fiscal year of the company ends on that date.

The Court: See if you can find out about this and agree between yourselves how the deficit was arrived at and what factors were taken into account. It oughtn't to be a matter [1975] of dispute. It has been done. The records must show how it was done.

Mr. Strachan: What I was trying to get was the debits and credits that show the end result.

Witness Hodge: Counsel, as I told you, there was no definite tie-down of certain debits and certain credit, because there weren't complete records kept or made available during the period of the trusteeship. We certainly took the credits and the liabilities as they existed and set up the books and made a balancing figure for the deficit, and that was it. [1976]

* * *

(Testimony of Robert Hodge.)

The Court: The record will show the jury present in their proper places.

I will read into the record a note I received from the jury. You think about it, and we will discuss it in their absence.

"January 11th.

"The Honorable Judge James M. Carter:

"The jury would like to know if it is possible for them to visit one of the orange plants in order to gain some knowledge of the manufacture of fruit juice and its components.

"Signed: The Jury."

We will consider it later. And thank you for the communication.

Mr. Clerk, you file this.

ROBERT HODGE

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Hodge, this morning I believe you said that as [1978] you recalled it during the Chapter 11 receivership the receiver earned a profit of 40 or 50 thousand dollars; do you recall that?

A. His report stated that there was a profit in excess of $50,000.

(Testimony of Robert Hodge.)

Q. Was that profit under the receivership something that you entered into the books of account of the corporation as a profit or loss to the corporation? A. Not as that particular item.

Q. As a matter of fact, as I understand it, the profit from operation, together with the proceeds from the sale of the fixed assets under this lease-back arrangement went into a pool from which the expenses of the receivership were paid, other prior claims were paid, and the remainder was disbursed pro rata among the remaining creditors?

A. That is what happened, yes, sir.

Q. Do you recall whether for the year ended January 31, 1949, you reported a profit or loss?

A. For the year ended January 31, '49? That was still under the trustee operations.

Q. Do you remember whether for income tax purposes you prepared a return showing for the corporate operation a profit or a loss for the year ended January 31, 1949?

A. The tax return prepared for the fiscal year ended January 31, 1949, showed a loss for that period for tax purposes. [1979]

Q. What was the amount of that loss?

A. The amount of the loss for that period was $100,503.15.

Q. In the course of the winding up of the Chapter 11 proceeding, the indebtedness of the corporation before the bankruptcy proceeding was discharged by payment of less than the full amount due, is that correct?

(Testimony of Robert Hodge.)

A. Yes, sir, that is correct.

The Court: Well, as an over-all picture, certain bills were paid in full, and certain bills pro rata?

Mr. Strachan: That is right.

The Court: All right.

Q. (By Mr. Strachan): But the effect of all those adjustments was that the debts were settled for about $205,000 less than their full face amount; is that about correct?

A. I am not quite sure of the amount. [1980]

The Court: I don't think your question is quite accurate. What the question means is when the corporation came out of reorganization proceedings, it had a decrease in debts of $205,000. Is that what you had in mind?

Mr. Strachan: Well, I think that is the same thing. I had in mind that there was about 205,000 of indebtedness unpaid which was released at the close of bankruptcy.

Mr. Dixon: Well, I object, your Honor, to any further questions of this kind. I think the records of the trustee themselves are the best evidence for this kind of thing, if it is material to the issues of this lawsuit. I have no objection to it insofar as the question relates to any item on the balance sheet.

The Court: Well, counsel assured me that there was going to be just a few questions on this and then we were going to something else.

Mr. Strachan: That I would tie it in.

The Court: If the witness knows, he may answer. Objection overruled. I think the trustee's records

(Testimony of Robert Hodge.)

are the best evidence. This man attempted to reconstruct something after the period of receivership.

The Witness: From the figures obtained from the trustee's report, your figure is approximately correct.

Q. (By Mr. Strachan): In Exhibit 60, will you tell us where that gain to the corporation and loss to the creditors [1981] was reflected?

A. As I have previously testified, all of the reorganization transactions and the operating deficit up to the point of the commencement of Chapter XI proceedings are reflected in this deficit figure of $224,852.56 as nearly as we could reconstruct it.

Q. To be more specific, how was that $205,000 of savings on indebtedness applied to the capital deficit?

A. As I have previously told you, I cannot break this $224,000 deficit down to dollars any place. It is simply a balanced figure that was set up when the corporation commenced operations after the termination of Chapter XI proceedings. That is why I could not answer your earlier question as to what made that figure up.

Q. If the reduction in indebtedness through the reorganization proceeding was $205,000, just assuming that that is a fact, if it had not been for that scaling down of debts, the deficit shown on Exhibit 60 would have been increased by that amount, would it not? It would have been about $429,000?

A. I don't believe you can make that statement.

(Testimony of Robert Hodge.)

counsel. If the debts had not been settled under the Chapter XI proceedings, this company would never have commenced business again and, therefore, there would never have been any such statement prepared. So to say that I would have done [1982] that——

Q. Why wouldn't it have resumed business if that $205,000 hadn't been wiped out?

Mr. Dixon: If the court please, I object to any further questioning on this. We have been through this and it seems to me——

The Court: Sustained. It is obvious if it had not been reorganized it would have gone into bankruptcy and that would have been the end of the corporation. It was reorganized and it came out. The witness has testified the figure was the result of various transactions in the reorganization.

Q. (By Mr. Strachan): You are aware of the fact, are you not, during the first six months of 1949, that is during the period ending July 31, 1949, the first six months of the fiscal year, Winckler owed the corporation some $38,000 that by action of the board of directors was forgiven?

Mr. Dixon: Now, if the court please, I am going to object to going into this question. I think we are not here to try any question of that kind. It is agreed that——

The Court: I am going to permit inquiry. Overruled. We are not going to try that issue. That isn't a question before the court. The question before the court and the jury is what was the status of the

(Testimony of Robert Hodge.)

corporation in 1951. Anything that bears on that would be material. I say frankly I think you are going at it backwards. You have information available in 1951 and if you want to proceed this way, you may. [1983]

Mr. Strachan: I think I should, your Honor.

The Court: I may take the liberty, then, from time to time to tell the jury that these particular things aren't in issue except as they wind up having some reflection on the situation in 1951.

Mr. Strachan: I think they have a bearing, also, your Honor, on the propriety of the statement of income here as to whether there was a gain or loss, net income or net loss in that period. It has a bearing on that as well as the capital surplus and deficit.

The Court: It might have some bearing. When you make a broad general statement as the court did, it is true it might have some other bearing. I am not trying to cover the whole field in the statement. The evidence may be admissible for various purposes. I have overruled the objection. You may inquire into that.

The Witness: Would you read the question, please? [1984]

* * *

(The question was reread.)

The Witness: As I recall the accounts on the books at that time, there was some 11,000 of that amount charged to Mr. Smith for checks made out to his order. The balance was in one or two other ac-

(Testimony of Robert Hodge.)

counts. I am not quite clear on it. These amounts were advanced to Mr.—several of these advances were to Mrs. Campbell and to Mr. Smith. Some of them were charged to Mr. Winckler and some of them were charged to Mr. Smith. Certainly the board of directors took action to forgive the total debt, whoever's debt it was. [1985]

Q. Now, when by board action or otherwise a debt is written off as a bad debt, or is forgiven, released for any reason at all, during an accounting period, do you not ordinarily show the loss on that write-off during the accounting period?

A. Judge, may I go further on this and tell my story of the whole thing?

The Court: Yes.

The Witness: As I recall——

The Court: First, when witnesses are asked a question, I would like to have you first try to answer the question, if you can. All questions aren't susceptible of yes or no answers. But first try to answer the question, and then make whatever explanation is necessary to understand the problem.

The Witness: The writing off of this debt I considered as a part of the reorganization proceedings and not a part of the corporate operations, even though the board of directors actually passed a resolution to forgive this debt subsequent to the termination of the trustee proceedings.

The Court: Now, your answer would be that ordinarily if you wrote a debt off during an account-

(Testimony of Robert Hodge.)

ing period, that would be reflected in your operations statement?

The Witness: That is true.

The Court: But you didn't do it this time because this was tied in with the reorganization? [1986]

The Witness: With the reorganization; yes.

The Court: And although the resolution came later, you related it back to the reorganization?

The Witness: That is true.

Now, may I explain the whole situation as I recall it?

The Court: Yes.

The Witness: Mr. Winchler called me to come down to the plant some time in May after he had commenced operations and the trustee proceedings had been terminated, and he told me about this debt on the books that had been forgiven.

I said, "Mr. Winchler, the corporate action should be taken to record this debt, this forgiveness of this debt, in order to get the records clear," because if there is no specific authorization for charging off of this debt, I would not sign the accounts.

Well, the next visit I had with the corporation was at the time of this audit, which was in August, at that time I had access to all of the minutes of the board of directors, during the trustee proceedings the attorney for the trustee had written up minutes, and I found at that time it was not necessary for me to have requested Mr. Winchler to have had this corporate action taken by the board of directors

(Testimony of Robert Hodge.)

in forgiving this debt, because in the minutes of January some time——

The Court: During the reorganization? [1987]

The Witness: During the reorganization, there had been passed resolutions which would have permitted this write-off under the terms of the reorganization, and there were mutual agreements signed prior to the termination of the trusteeship to do so.

Q. (By Mr. Strachan): You know, do you not, at a meeting of the board of directors of January 24, 1949, this was at least three months after the conclusion of the reorganization proceedings, Mr. Winckler explained that he was then indebted to the corporation in the amount of $38,140.33; don't you know that is true?

A. That is true. And that is——

Q. Let me ask another question. Isn't it true, also——

Mr. Dixon: Let the witness answer.

Q. (By Mr. Strachan): ——that the books of the corporation, as of that date, showed Mr. Winckler to be indebted to the extent of thirty-eight thousand plus dollars?

A. That is true. But the books had not been as yet finally closed as of the termination of the trustee proceedings.

Q. But in June of 1949 the corporation was operating, was it not?

A. That is true. But I had not completed this audit, or there had been no good accounting supervision at that time until I came in to finish this audit

(Testimony of Robert Hodge.)

to adjust the books [1988] properly as of the termination of the trustee proceedings.

Q. Isn't it a fact that the 38,000 of indebtedness from Winckler had been on the books for a long time prior to June?

A. A good part of it dated back to '46.

Q. Some of it dated to '47, isn't that a fact?

A. I believe so.

Q. Some of it to '49? A. That is true.

Q. All right. And it was still on the books in June of '49?

The Court: You have asked that. It was on the books and the witness has given you the explanation. Go on to something else.

Q. (By Mr. Strachan): Now, will you tell us how in your accounting procedures you eliminated that $38,000 asset from the books of the corporation, and where it appears on Exhibit 60, which is the income account for the six months period and the balance sheet as of the end of the period?

Mr. Dixon: If the court please, I object to this question. I believe it has been asked in two or three different ways and answered two or three different times.

The Court: I think it has substantially as to how it was eliminated, that part of the question. Now, where it might appear, the latter part of the question probably hasn't. [1989] But you may answer the first part, again, if you want to, and the latter part.

Do you want the question read?

(Testimony of Robert Hodge.)

The Witness: Yes, please.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

The Witness: As I have previously explained, the assets and liabilities after the termination of the trustee proceedings were set up on the books and we started off fresh. Anything prior to that time is reflected, maybe not specifically, but certainly in the $224,000 deficit that we start out with. Anything I considered as part of the reorganization is in that figure.

Q. (By Mr. Strachan: Then you mean that you reflected the effect of the write-off of Winckler's 38,000 by adjusting the deficit figure as of the end of the prior year, that is the $224,000 figure?

A. The minutes of the board of directors were dated prior to that date, prior to January 31, '49, which effectively forgave this indebtedness in conjunction with the rest of the reorganization proceeding.

The Court: Now, wait. You have told us about two sets of minutes. One set of minutes while the reorganization was going on, and then a subsequent set after the reorganization. Which one are you referring to? [1990]

The Witness: I am referring to the January, '49, minutes.

The Court: While it was in reorganization?

The Witness: While it was in reorganization.

The Court: All right.

(Testimony of Robert Hodge.)

Mr. Strachan: I wonder if I can show him a set of minutes and ask him if he can identify the particular minutes?

The Court: Yes.

Juror Johnstone: Have we ever been told what that debt was for, that $38,000? I don't remember.

The Court: Yes; you were told by Mr. Winckler, but we have had a lot of evidence and you may have forgotten.

I am not going to try to repeat the testimony, but what I say may refresh your recollection.

Mr. Winckler testified something about advances; he also told about an agreement he had to pick up Smith's stock, and that was tied in with the picking up of Smith's stock, at the time when the corporation was attempting to make the arrangement with the party who put up the additional money and took the deed to the property, and when the corporation, in substance, in the reorganization, sold its interest in the property subject to the buy-back arrangement in the lease, some connection between that and picking up the Smith stock was part of it.

Do you remember something about that?

Juror Johnstone: Yes. [1991]

The Court: We are not trying out what that was for. It could have been a trip to Las Vegas, it wouldn't make any difference, if it were set up on the books of the corporation as an asset, a debt due from Winckler, it wouldn't make any difference. Winckler could have gone out and gambled $38,000.

Mr. Strachan is merely trying to trace back the

(Testimony of Robert Hodge.)

back history leading up to the question of the status of the corporation in 1951.

He also informs me that he is directing your attention to the accuracy of Exhibit 60.

I think those are the two particular grounds you indicated, Mr. Strachan? [1992]

Mr. Strachan: Yes, sir.

The Court: All right.

Mr. Strachan: I would like to have the witness identify in this minute book, if he can, the earlier minutes he referred to.

The Witness: These are the later minutes. These are the June 24, 1949, minutes.

Q. (By Mr. Strachan): The book also includes prior minutes going back some time—I don't know how far.

A. All right. Would you mind marking your place?

Q. No. That's all right.

Mr. Dixon: If the court please, I frankly don't see how this can in any way relate to any of the issues of this lawsuit. I object to it for that reason.

The Court: This particular question would only relate to the credibility of the witness.

Mr. Dixon: That is correct.

The Court: He said he relied upon certain minutes and he was informed about certain contracts, and that's all this would relate to.

Mr. Dixon: The minutes may not be in there, as far as that is concerned.

(Testimony of Robert Hodge.)

The Witness: Are you referring to the minutes of January 18, 1949?

Q. (By Mr. Strachan): I am just asking you to identify [1993] the minutes you had in mind.

The Witness: Oh. That is in the minutes that I am talking about, yes, sir.

The Court: Well, let those be marked for identification Defendants' exhibit next in order.

The Clerk: Defendants' Exhibit AY for identification. Do you have a loose copy you could use, or do you want the one in the book marked?

Mr. Dixon: What is this?

Mr. Strachan: I don't know.

Mr. Dixon: Well, what is the date of it?

The Court: They can be photostated if you want to offer them in evidence. We will put a flag on them and mark this for identification AY at this time. If they are photostated, then prepare copies for counsel.

The Clerk: I have marked the minutes dated January 18, 1949, as Defendants' Exhibit AY.

(The exhibit referred to was marked Defendants' Exhibit AY for identification.)

The Witness: The two minutes I refer to were dated January 18, 1949, and June 24, 1949, that I identified for you.

The Court: But the ones you talk about, those occurred during the receivership.

The Witness: Well, January 18. 1949.

(Testimony of Robert Hodge.)

The Court: And they have been marked [1994] AY.

Q. (By Mr. Strachan): What was the other?

A. June 24, 1949.

Q. That is the one that contained a statement by Winckler that he owed the corporation and there was a resolution forgiving the indebtedness.

The Witness: That is true. There are also some mutual releases dated March 7, 1949, between Nicholas J. Winckler, Bernard J. Smith, and Winckler & Smith Citrus Products Company mutually releasing each other, which are part of the writing-off of this $38,000 amount.

Q. (By Mr. Strachan): Where do those appear?

A. I examined them at the time. I don't know where they appear now.

The Court: What was the date that the corporation went out of receivership?

The Witness: Some time in April. I have forgotten the exact date.

The Court: April?

Mr. Strachan: April 1, I believe it was, wasn't it?

The Witness: I am not sure. I have forgotten.

Q. (By Mr. Strachan): Calling your attention to Exhibit AY, being minutes dated January 18, 1949, I would like to have you point particularly to the passage there that relates to the $38,000 forgiveness.

A. There is no passage in here that directly re-

(Testimony of Robert Hodge.)

lates [1995] to any $38,000. The passage that I based my authority to write this amount off reads:

Be it resolved that should the above transaction with Maxwell L. Rubin fail of consummation for any reason whatsoever, then in that event should any other offer be made to this corporation to purchase the aforesaid assets for a consideration of $50,000 or more, provided Bernard J. Smith receives $10,000 from the said sale of this capital stock and mutual releases are executed by Bernard J. Smith, Nicholas J. Winckler and the corporation in favor of each other, and in that event the president and secretary are authorized to accept said offer on behalf of the corporation and execute any and all instruments or deeds and bills of sale and agreements that shall be required or necessary to consummate such other sale. This authority shall be effective for a period 90 days from date.

Q. That is what you relied on?

A. Yes, that, together with the mutual releases and agreements which were signed by Winckler & Smith Citrus Products Company and Nicholas J. Winckler and Bernard J. Smith.

Q. If the books and records had been kept in accordance [1996] with the resolution of June 24, 1949, forgiving the indebtedness, then the books would have shown that during the six months ended July 31, 1949, there would have been a loss on that forgiveness, is that not a fact?

The Court: We have been all over this, counsel. It is a repetitious question.

(Testimony of Robert Hodge.)

Mr. Strachan: I don't think I have had an answer to it.

Mr. Dixon: If the court please, I object again to any further questioning on this. It is not in dispute that the amount was charged off before these books were opened, and we start with these books and the balance sheets as set forth in Exhibit 60 as far as the plaintiff is concerned.

The Court: Objection sustained.

Mr. Strachan: I offer to show, if allowed to proceed with that line of examination, that had the books——

Mr. Dixon: Just a moment.

Mr. Strachan: ——been kept and the exhibit prepared in accordance with the resolution——

Mr. Dixon: Just a moment, counsel.

The Court: Just a moment. Make your offer of proof out of the presence of the jury.

Mr. Strachan: I will do it at the next recess.

The Court: All right.

Q. (By Mr. Strachan): Now, with reference to Exhibit 61, in the capital stock and deficit account you carried forward [1997] that same deficit as of January 31, 1949, of 224,800 some dollars, is that correct? A. That's right.

Q. For that fiscal year you deducted depreciation on the fixed assets, did you not, for the months of February and March, 1949?

A. I don't see how I could have since they didn't have any, but I will certainly check to make sure.

Q. I think you testified this morning you wrote

(Testimony of Robert Hodge.)

off the fixed assets as of the end of the prior year, isn't that right?

A. For tax purposes the assets sold as of April 3, 1949, were depreciated to that date.

Q. So that, according to the income tax return, as late as April 3, 1949, the assets were being carried on the books of the corporation, is that correct?

Mr. Dixon: The witness has testified, your Honor.

The Court: Well, he may answer.

The Witness: It is, your Honor—I mean I can explain it, but to give him a yes or no answer, I cannot.

The Court: Then explain it.

The Witness: As I have told you, counsel, we were called in to audit these books July 30, 1949. At that time we put a great many entries on the books to try to take care of all the transactions that had happened prior to the termination [1998] of the trusteeship. All of those entries were put on the books and the books were closed as best we could. We opened a new set of books to start off with the new operations of the company after the termination of those proceedings. Now you ask me if they are on the books at such and such a date. Actually, they probably were. Effectively, they were not.

Do I make myself clear?

The Court: Well, for tax purposes——

The Witness: For tax purposes, I owe it to my client to get as much of a deduction for tax purposes as I can, so I do that.

(Testimony of Robert Hodge.)

The Court: So you took a depreciation of——

The Witness: Right up to the actual date that they were transferred from the trusteeship to the new owners.

The Court: I still don't know for what period you took depreciation as shown in 61.

The Witness: From February 1 to April 3, 1949, we took depreciation on the tax return for tax purposes.

The Court: On the real property—I mean the buildings and machinery?

The Witness: The buildings and machinery that were sold under the trustee proceedings.

The Court: And that was proper for tax purposes?

The Witness: That was proper for tax purposes.

Q. (By Mr. Strachan): And it was proper for tax purposes [1999] because as of April 3, down to April 3, the corporation showed on its books that it was the owner of those fixed assets, isn't that a fact?

A. The corporation showed on its books that they owned those assets until I came in and adjusted them in July or August, 1949. [2000]

Q. All right. And you adjusted them to show that at least until April 3rd the corporation owned those assets, isn't that correct?

A. I don't recall what the effect—you are getting technical. For tax purposes I did the best I could for my client; I took depreciation up until the last possible minute, I wanted him to have all the benefit of the tax laws that he possibly could have.

(Testimony of Robert Hodge.)

Q. You couldn't honestly give your client the benefit of a tax loss on depreciation on assets that it didn't own, could you?

A. They were under the jurisdiction of the trustee up to that date.

Q. But you couldn't for tax purposes depreciate assets that the books showed you client didn't own, could you?

A. I just told you the books showed that they owned them up until I went in to adjust the books.

Q. And after you made the adjustments you so adjusted them, as I understand it, that they showed that down to at least April 3rd your client owned fixed assets which you depreciated in your tax return; is that correct or not?

A. No, that is not correct. I adjusted the books of the corporation, to eliminate all of the transactions prior to the termination of the trusteeship. Now, your tax return is something else. The books of the corporation were adjusted [2001] as far as we could, as best we could, upon the records and information we had up to the point of the termination of the trusteeship. Then we started out with a fresh set of books for the operations of the corporation.

We do not commingle the operations of the trustee or the operations of the company.

Q. What was the date of this fresh set of books you started for the corporation?

A. Some time after April 3rd.

(Testimony of Robert Hodge.)

The Court: That is the date——

The Witness: The termination date of the trusteeship, whenever that was, subsequent to that date.

The Court: Counsel asked the date of the books, which is uncertain.

You started to set them up, I understand, some time after July?

The Witness: The books were not effectively set up until—were not effectively adjusted until some time in July, or, rather, in August.

The Court: But you adjusted them as of the——

The Witness: As of the effective dates.

The Court: The early part of April?

The Witness: That is right, your Honor.

Q. (By Mr. Strachan): For the purposes of the income account and balance sheets shown in Exhibits 61 and 60—— [2002]

Mr. Dixon: Which one, counsel, are you talking about?

Mr. Strachan: Both.

Mr. Dixon: Let's have it confined to one.

Mr. Strachan: I can combine the two in this one question, if Mr. Dixon will let me complete it.

The Court: Go ahead.

Q. (By Mr. Strachan): In both 60 and 61, you reflected the loss on the sale of the physical assets as having occurred on or prior to January 31, 1949, is that correct? A. That is correct.

Q. For the purpose of income tax, your income tax records showed continued ownership of those fixed assets until some time in April of 1949, is that

(Testimony of Robert Hodge.)

correct? A. That is correct.

Q. The loss which was sustained on the sale of those fixed assets for income tax purposes was taken for the year ended January 31, 1950, is that not correct? A. That is true.

Q. Will you tell us what the amount of that loss for income tax purposes was?

A. I thought I had already testified to that. I am sorry. Or was it January 31, '49, that I testified to?

For the year ended January 31, 1950, the net income for—net income, not a loss, for tax purposes was $72,320.60.

Q. What was the loss on the liquidation of the capital [2003] assets? A. For tax purposes?

Q. For tax purposes.

A. Your Honor, before I answer that question, may I explain to the jury that you do not necessarily keep your accounting records on the same basis that you do your tax computations?

The Court: Yes.

The Witness: On the books of Winckler & Smith they had the assets set up on an appraised value, and the assets were so carried and so depreciated all through their books. However, the tax laws will not allow you to take depreciation on appraised values in your tax computations. So your tax computation must be based on your cost values.

Now may I have your question again, sir?

Mr. Strachan: Read it, please.

(The question referred to was read by the reporter, as follows: "What was the loss on the

(Testimony of Robert Hodge.)

liquidation of the capital assets for tax purposes?")

Mr. Dixon: I object to the question as being wholly irrelevant and immaterial and having nothing to do with the issues in this lawsuit. This is not a tax case. We are dealing with balance sheets as they have been marked and are in evidence. [2004]

The Court: Overruled.

The Witness: The tax loss on the sale of the property as of April 3, 1949, was $46,867.81.

Q. (By Mr. Strachan): And for tax purposes that was put one year later than it was for balance sheet purposes, isn't that correct?

A. Pardon me. I have already explained to you for the balance sheet we have one base——

Q. I am not talking about bases, Mr. Hodge.

A. Well, you certainly are. You are asking me the basis for my statements, and you are trying to put them on a similar basis for the tax return.

The Court: Let me see if I can straighten this out.

When a person buys property which is used in a business, he has to keep records as to his cost of it, and if he later sells it or loses it, the cost and other improvements he has put on is the base, is it not, that you use for tax purposes?

The Witness: That is right, your Honor.

The Court: Therefore, if I had bought a service station 20 years ago and paid a couple of thousand dollars for it, and now it was worth $50,000, my base is what I paid for it to start with?

(Testimony of Robert Hodge.)

The Witness: Less depreciation.

The Court: Now, meanwhile I might be in business, I would have the station set up on my books at an appraised [2005] value of what I thought it was worth, and for the purpose of my books, if I lost that service station or sold it, I would have to have adjustments to go through on my books to reflect the loss of that asset; is that right?

The Witness: Yes.

The Court: Therefore, the two computations would be entirely different, the income tax computation would start on a cost basis, to make my income tax records correct, the removal of that asset from my books, where it was on an appraised value would be on an entirely different basis and take different computations?

The Witness: That is correct, your Honor.

The Court: Is that what happened here?

The Witness: That is exactly what happened here.

The Court: For income tax purposes the loss was some——

The Witness: $46,000.

The Court: For the purpose of the books set up on an appraised value, the loss was——

The Witness: $169,000 odd.

Q. (By Mr. Strachan): As to the year in which these losses were taken for the two different purposes, loss on the sale of fixed assets for your ordinary balance sheet purposes was reflected as having occurred in the year ended January 31, 1949,

(Testimony of Robert Hodge.)

is that correct, that is, $169,000 computed loss from the books? [2006]

A. No, it is not reflected in my balance sheet at all, because I considered that loss as transpiring during the trusteeship proceedings. I do not attempt to reflect what happened——

Q. But the effect of that loss is reflected, is it not, in the deficit stated as of January 31, 1949?

A. That is true. That, plus all other transactions during the reorganization and the carry-over from the previous years' deficit.

The Court: All right.

Now, just a minute. As far as income tax purposes were concerned, you took the loss, the 46,000 loss, in the year ending January 31, '49?

The Witness: '50.

The Court: January 31st, '50?

The Witness: Yes, sir.

The Court: On the ground that the loss occurred when?

The Witness: April 3, 1949.

The Court: And for the purpose of the books and records of the company you say it is reflected in the year ending what?

The Witness: It is not reflected in the statements as such, but——

The Court: But it has an effect on the deficit in what year? [2007]

The Witness: It has an effect on the deficit as of July 31, 1950—January 31, 1950.

(Testimony of Robert Hodge.)

The Court: Well, that is the same year you gave me as for income tax purposes.

The Witness: That is right. It affects the same year. It affects the deficit of the company books in the same year that it affects the loss on the tax computation.

Q. (By Mr. Strachan): Mr. Hodge, I thought you said that the effect of these reorganization operations had entered into and affected the net results shown as the deficit of January 31, 1949, of $224,800. A. That is right.

Q. So that the reorganization adjustments, reduction of debt, loss on sale of assets, is reflected there as of the deficit balance at the end of the fiscal year 1949, is that correct?

A. That is true.

Q. But for income tax purposes you showed that loss on the sale of physical assets as having occurred in the year ended January 31, 1950?

A. That is true.

Mr. Strachan: I see it is near adjournment time, your Honor. That finishes that phase of the examination.

The Court: And that is because you had to go back and reconstruct what happened in the receivership? [2008]

The Witness: That is right.

The Court: As far as you were concerned, that was proper bookkeeping practice?

(Testimony of Robert Hodge.)

The Witness: That was proper bookkeeping practice.

I merely tried to show in this statement the operations of the company itself; not the reorganization proceedings whatsoever, because I did not have the full data or information to properly show such entries. [2009]

* * *

(Whereupon the jury left the courtroom and the following proceedings were had in the absence of the jury:)

The Court: The record will show the jury now absent. What matter are you going into next, Mr. Strachan?

Mr. Strachan: Well, I was going into the balance sheet for the year ended, I think it is 1951. I was going to inquire about some of these other assets that were set up.

The Court: Well, at least we are getting closer to the year in question.

Mr. Strachan; Really, your Honor, the direct examination, which I thought was quite a streamlined examination, consumed a full day. I think it left a lot of questions unanswered.

The Court: I hurried Mr. Dixon, too. As a matter of fact, I tried to lay the general foundation on each of the documents to save time, if you will recall.

Mr. Strachan: Yes.

The Court: I tried to encourage him to proceed

(Testimony of Robert Hodge.)

a little faster, and you don't mind if I encourage you now and then.

Mr. Strachan: You might even apply the lash, if you want. [2010]

* * *

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Q. (By Mr. Strachan): Mr. Hodge, I would like to refer now to Exhibit 63, the income account, the balance sheet, for the year ended January 31, 1951. A. Yes, sir.

Q. At the foot of the second page, which is statement [2011] of assets, there is an item of deferred promotion expense of $25,000. From your work papers, will you tell us what is included in that? A. You mean the exact dollar amounts?

Q. What items are the basis of the expenditures?

A. There were some $36,000 of items which were proratable over the—I am sorry. It is more than that. There was a total of about fifty-nine odd thousand dollars of items which could be applied to this sales campaign that Winckler & Smith Citrus Products put on for these new products. Of this amount $10,000 we allocated to normal operations and the balance we considered to be for this promotional campaign. Do you want every dollar?

(Testimony of Robert Hodge.)

The Court: Before you go further, then you in substance divided the $49,000 into——

The Witness: There was $50,000.

The Court: To start with?

The Witness: To start with, and of that we said 10 would be applicable to normal advertising operations, and then we divided the remainder of $49,000 into the year ending January 31, 1951, and then the following year.

Q. (By Mr. Strachan): Between what dates were those expenditures you were prorating made?

A. I do not have them in my papers, counsel. I do not have the dates in my papers. I would say from what I do [2012] have that they were made in October, November and December, approximately, of 1950.

Q. And those expenditures, I think you said, were made principally for the purpose of publicizing and getting market acceptance for lemonade, orangeade and blends, is that correct?

A. I don't believe I said blends. I believe I just said the orangeade, lemonade and the new products. The blend was not a new product.

Q. What other new product did you have in mind?

A. Well, they had a product they called One Plus Five, which was a product that they shipped out and you added five parts of water to it. In other words, if there was a can of juice, you added five parts of water to this can to make your beverage.

(Testimony of Robert Hodge.)

A Juror: A concentrate?

The Witness: It is not quite a [2013] concentrate.

Q. (By Mr. Strachan): The next item is called Unabsorbed—what is it, Unabsorbed Preseasonal Expenses? A. Yes, sir.

Q. What did that item of $22,500 consist of?

A. As I previously explained, our audit papers are not kept intact. We take out all but the skeleton information. I do not have the nature—the exact items that make up that amount. However, I know from my audits of Winckler & Smith Citrus Products and it was expenses which were absorbed over a whole season, and they would be prepaid at any one balance sheet date; that is, there would be something. Because at January 31st you are getting ready for the navel season, and July 31st your Valencia season has not yet been finished, completed.

Q. You say the Valencia season hasn't been finished at July——

A. At the July audit. In the two audits there was always some unabsorbed preseasonal expenses.

Q. Isn't it a fact that something over $19,000 of that $22,000 total was ordinary plant expense that had been paid during the course of the year?

A. Well, just what does counsel mean by ordinary plant expense, now?

Q. Do you have an item there of about $19,000——

(Testimony of Robert Hodge.)

A. I do not have any breakdown of this figure in my [2014] papers, I am sorry.

Q. Where was it that you reclassified these expenditures made during the year and charged to expense, so as to remove them from expense and set them up as assets, do you have a schedule in your working papers that shows how that was done?

A. No, I do not.

At that time we had what was called a standard cost basis of pricing out inventory. In other words, you would take your expenses from one season to the next—I mean for a complete season, and estimate that you were going to sell so many cases of orange juice, and then as the orange juice was sold, you would take from your accumulated overhead the per case estimate as overhead from this preseasonal expense, and that left this amount at January 31, 1951.

In other words, if the Valencia season ended, say, October 31st, then your expenses for November, December, and January would be thrown into an account called preseasonal expenses. This account would then be credited at a predetermined rate for standard cost for every case of orange juice or other product sold.

Q. Do you have before you the amount of unabsorbed plant expense?

A. No, sir; except as shown in the balance sheet, the unabsorbed plant expenses of $22,443.84. [2015]

Q. Isn't it a fact that $19,268.42 of that item was charged to plant expense, and for income tax

(Testimony of Robert Hodge.)

purposes it was deducted during the fiscal year ended January 31, 1951, as operating expense, although for balance sheet purposes it was reclassified and set up as an asset at the end of the year?

A. As I recall, in 1951 the income tax laws did not allow you to set up reserve for estimated expenses or defer your expenses. The income tax laws at that time, if my memory is correct, you must take these expenses as you incur them.

The Court: So——

The Witness: So this was done for tax purposes.

Q. (By Mr. Strachan): So that that item of 19,000, which appears as an asset at the year end was deducted as an operating expense for tax purposes, is that correct?

A. The item is 22,000, counsel, in the balance sheet.

Q. Well, now, isn't it——

The Court: In other words, the entire $22,443.84, page 2 of Exhibit 63?

The Witness: Yes.

Q. (By Mr. Strachan): That is not accrued expense, is it; it was expense that was actually paid out for expenditures actually paid during the fiscal year of 1951?

A Or incurred, or set up as depreciation, or however [2016] you want to express it, yes, sir.

Q. And those were taken as deductions for business expense for the income tax of that year, isn't that correct? A. That is correct.

(Testimony of Robert Hodge.)

Q. Now, isn't it true, as a matter of fact, that you also, for the year ended—that was deducted for the year ended 1950 and '51, both, was it not?

A. In the tax return?

Q. Yes, sir.

A. No, sir; that is not true.

Q. Are you sure of that? Will you examine the tax returns?

The Court: Do you mean he took the same figure each year, or took the same expenses deducted?

Mr. Strachan: The same expenses were deducted in two successive years.

The Court: I still don't understand you. Do you mean there was a double deduction of the same items, or the same type of expense was deducted in '50 and the same type in '51?

Mr. Strachan: It is my understanding that the same item was deducted two successive [2017] years.

Mr. Dixon: I don't see the purpose of the question, your Honor. I don't know how long it will take the witness ever to answer it. It seems to me it is wholly irrelevant, what was in the tax return, as far as this case is concerned. The plaintiff stands upon the exhibit covering the balance sheet for the year ending January, 1952.

The Court: Your question related entirely to the tax returns?

Mr. Strachan: No.

The Court: I think it did, as you asked it.

(Testimony of Robert Hodge.)

The Witness: It certainly does.

Mr. Dixon: Yes, it does.

Mr. Strachan: No. I am asking him this, whether he didn't for balance sheet purposes in the year ended January 31, 1951, set up as an asset this item of $19,000, which had actually been a business expense of that year, set it up as an asset.

The Court: That isn't what you asked, counsel.

Mr. Strachan: But you have to take the succession of events. Then he took that, as I understand it, that 19,000 as expense, rather than acquisition of an asset, for tax purposes in 1951. Then in the following year, which was the year ended January 31, 1952, in which on his books he carried this 19,000 as an asset, he also deducted it again in the 1952 return. So he didn't treat it consistently in either [2018] the return or the balance sheet showing.

The Court: I will sustain the objection to the questions about the income tax. They are worked out on a different basis, as you and I both know, in many cases. If you want to show inconsistencies between successive statements of the corporation, you may inquire.

Mr. Strachan: Your Honor, that is something different. I propose to show that he deducted the same item for income tax purposes in two successive years. I don't think anybody will contend that is proper.

The Court: And what does that prove? If

(Testimony of Robert Hodge.)

proves, No. 1, maybe he made a mistake in his income tax return, or, No. 2, the company filed a crooked return. What has that got to do with it? Objection sustained.

Make your offer of proof out of the presence of the jury. We are going to try the issues of this case and not an income tax violation or the accuracy of some other work that was done. This is not one of the issues here.

Mr. Strachan: I think it goes to the credibility of the witness as well, your Honor.

The Court: Limit it as to Exhibit 63 or successive statements of the company, Mr. Strachan.

Q. (By Mr. Strachan): Now, I would like to refer to Exhibit 64. On the income account you show a loss for the six months' period ended July 31, 1951, of nearly [2019] $150,000. Isn't it true that in the first six months of that fiscal year Winckler-Smith Company had sustained a loss in every month? A. I do not know.

Q. I think you expressed an opinion yesterday, did you not, as to why it was that there was a loss for the first six months of that fiscal year as compared with a profit for the first six months ended July, 1950?

A. I did express an opinion, yes, sir.

Q. Would you repeat that opinion?

A. As nearly as I can remember, I said that the loss was substantially due to a reduction in sales from California operations of approximately a half million dollars.

(Testimony of Robert Hodge.)

Q. Do you know why there was a reduction in the sale of products of a half million dollars in the two years, the first six months of the two years?

A. No. I just know that the books showed that there was a loss of some half million dollars in sales.

Q. And did you know that Mr. Winckler had stated that the reason for the difference in profit and loss as between the two years was because the year 1950 had a very unusual situation due to the inadequate Florida stocks, which permitted us, Winckler, to run a large volume during the winter months, and this had never happened before and it is not anticipated in the future? [2020]

A. I did not know that, sir.

Q. If Mr. Winckler is correct in that, it would explain, would it not, why the volume of sales fell off as between the two years?

Mr. Dixon: I object to that, your Honor. I think that is for the jury to decide.

The Court: Sustained.

Q. (By Mr. Strachan): Now, referring to the balance sheet——

The Court: Exhibit 64?

Mr. Strachan: Yes, Exhibit 64. Thank you, your Honor.

Q. The current assets there are less than half the amount of current liabilities, is that correct?

A. That is correct, sir.

Q. That is not normally an acceptable working cash position, is it?

(Testimony of Robert Hodge.)

A. No, sir; that is not.

Q. You mentioned yesterday in referring to the current liabilities that the unsecured loan mentioned there of some $30,000 was inclusive of a $25,000 loan, note, held by the Bank of America, is that correct? A. Yes, sir; I did.

Q. And I think you said the same with respect to the unsecured note that was shown on the previous balance sheet at the end of January 31, 1951? [2021] A. Yes, sir.

Q. You meant by that the corporation had not pledged any of its own assets to secure that loan? Is that not what you refer to in that classification of unsecured?

A. It certainly was unsecured as far as the records of the corporation showed.

Q. But the bank was secured, was it not, by a continuing guarantee of the loan by Maxwell L. Rubin?

A. Of that I have not any knowledge, sir.

Q. Didn't you observe, when you examined the minute books of this corporation, that in the minutes of the meeting held on July 11, 1949——

A. The bank confirmation that I received direct from the bank stated that it was unsecured. [2022]

Q. Isn't it a fact that it was a loan guaranteed by Max Rubin?

A. I do not have any recollection of it.

The Court: There is a difference between guaranteed and secured, counsel.

Mr. Strachan: That's right.

(Testimony of Robert Hodge.)

The Court: The report shows it listed as unsecured. The witness has said that he had a confirmation that he had a confirmation from the bank that it was unsecured. It may well have been a guaranteed loan.

Mr. Strachan: Perhaps Mr. Dixon will stipulate that it was a guaranteed loan.

Mr. Dixon: I will not, counsel, so stipulate, because I don't know whether it was or not.

I know that as far as the records available from the accountant, Mr. Hodge, that the bank informed him that it was an unsecured loan as far as this corporation was concerned.

The Court: Let's go ahead.

Q. (By Mr. Strachan): Do you recall from the minutes of the meeting of July 11, 1949, that Mr. Winckler explained that the Bank of America had refused to grant a line of credit unless it was secured from Rubin?

Mr. Dixon: If the court please, I object to this line of questioning.

The Court: Sustained. The report shows an unsecured [2023] loan. The words "secured" and and "guaranteed" are two different words entirely.

You are not impeaching the report by this other showing.

If you want to show it was a guaranteed loan, you will be permitted to do so. This witness says he doesn't know.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): This balance sheet, Exhibit 64, is the first of your semi-annual balance sheets following the reacquisition of the fixed assets from the stockholders who acquired them during the first reorganization, is that correct?

A. That is correct.

Q. Those assets at the time they were sold, subject to the lease-back, were carried on the books at three hundred thousand, more or less, dollars; is that correct?

A. No, sir; that is not correct.

Q. What was it?

A. These assets have been added to materially in the intervening period.

Q. The reacquired assets, I say.

A. Oh. That would be right. The reacquired assets were the ones, right.

Q. That is, the reacquired assets carried on the books at a little over $300,000 were sold for $50,000 cash in this option to take back?

A. Do you mind if I check that figure [2024] again?

Q. Sure. I don't mind, I mean.

A. That $300,000 figure doesn't sound right.

(Witness looking at papers.)

The gross asset value was $309,207.97, that is right, sir.

The Court: As of what date?

The Witness: This is as of the date of sale on April 3, 1949.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): And in exchange fo those, transferred subject to the RFC mortgage, th corporation received $50,000?

A. That is correct.

Q. Now, when it reacquired those assets, th corporation paid Rubin $17,325 cash, is that co rect?

A. No, sir. I believe that amount was paid t Mr. Wallenstein.

Q. Wallenstein?

A. I believe so. Just a minute and I can ge my notes on that.

Q. Forget who the person was, but to the selle of the assets they paid that amount?

A. $17,325 was paid in cash.

Q. Yes. In addition to that the corporation is sued preferred stock, and that was a par valu stock, wasn't it?

A. Yes, sir; that was a preferred stock a 26,535 [2025] shares.

Q. And that in par value represented $132,675

A. Right, yes, sir.

Q. The corporation did not, then, set up thos reacquired assets as having the value of their the cost, $150,000, did it?

A. Their then cost was not $150,000, counsel They also assumed the liability under the RF mortgage, in addition to that.

Q. Well, now, as to that, I understand that th sale was made of the corporation's right, title an interest, subject to the RFC mortgage, and re

(Testimony of Robert Hodge.)

conveyance back was the seller's right, title and interest, subject to the mortgage; isn't that correct?

A. I don't know. You are getting technical now. I know that they paid $17,325 plus 26,535 shares of preferred stock, plus an assumption of an unpaid balance on a mortgage of $50,499.04.

Q. All right. Now, that $50,499 appears in the liabilities, does it not? A. As of——

Q. As of July 31, 1951? A. Yes, sir.

Q. So that it wasn't paid; that just became a liability? [2026]

A. They assumed the liability for that.

Q. But for the value of the assets in excess of the mortgage, the stated purchase price was $150,000, wasn't it? A. Yes, sir.

Q. Now, those assets were combined, were they not, with some assets that had been acquired, plant equipment that had been acquired during the leasehold period of about 97,000; is that correct?

A. I believe the cost value on those assets was more than that.

The gross asset value was—let me see. The net book asset value after depreciation allowance to date was $91,849.23.

Q. All right. Then you add that to the $150,000 that was paid for Wallenstein and Rubin's interest, and it gives you a total cost of what?

A. Plus the unpaid balance on the mortgage assumed.

Q. That unpaid balance on the mortgage was reflected in the liabilities?

(Testimony of Robert Hodge.)

A. Yes, but it still has to be added in your asset values. You assume that liability in connection with the repurchase of the assets.

Q. Actually they never paid that liability, did they?

A. No; but they assumed the obligation therefor.

Q. They were liable for it all the time, weren't they? [2027]

Mr. Dixon: If the court please, that is argumentative.

The Court: It is argumentative. Proceed. The objection is sustained.

Ask the witness the question you want to about these figures. [2028]

Q. What do you find the cost at the time of reacquisition was, including not only reacquired assets, but the depreciated value of the additional plant equipment?

The Court: By cost you mean cost as of the date of reacquisition? You are not talking about the earlier cost?

Mr. Strathan: I am talking about the cost as of the date of reacquisition, through the reacquisition.

The Court: All right.

The Witness: About $250,000 approximately.

Q. (By Mr. Strathan): Now, the books were then set up so that they did not reflect the $250,000 cost, in that correct? A. That is correct.

Q. What was the valuation which you wrote into the books for those fixed assets?

(Testimony of Robert Hodge.)

A. The valuation was an appraisal valuation based upon an appraisal dated January 12, 1951.

The Court: We are not talking about lands, but buildings and machinery?

The Witness: Talking about everything, your Honor.

Mr. Strachan: Land, buildings and machinery.

The Witness: Land, buildings and machinery.

The Court: Tools, automobiles, everything?

The Witness: Everything that was on hand at that date was valued. [2029]

Q. (By Mr. Strachan): What was the amount of that—— A. The amount of write-up?

Q. Yes, sir.

The Court: The appraisal is seven hundred and ten thousand.

The Witness: 732,000, your Honor.

The Court: 732?

The Witness: Yes. Approximately $442,000.

Q. (By Mr. Strachan): So that by that write-up the capital surplus was increased, is that correct? A. Capital surplus was set up, yes, sir.

Q. By that amount.

The Court: You said four hundred and some odd. Page 3 shows 343,000. Were you off a hundred thousand in that rapid computation you made?

The Witness: No, sir. The assets were roughly—that had been acquired from the time of receivership were roughly valued at 90,000, then $150,000 paid out in stock and cash, plus the assumption of the mortgage, would make it roughly $280,000. The

(Testimony of Robert Hodge.)

appraised value was $732,000. So roughly there is an increase of $442,000 in the write-up.

The Court: I was trying to square it with the bottom of page 3 where it says capital surplus arising from an appraisal of fixed assets and reorganization of the company, 343. [2030]

The Witness: There were some charges against that account.

The Court: I see.

The Witness: To reduce it to this figure.

The Court: All right.

Mr. Strachan: I wonder if the jury heard that.

The Witness: I am sorry. There were some charges made against this capital surplus account which was set up as a result of this appraisal for various reorganization expenses of the company.

The Court: Ask another question, Mr. Strachan.

Mr. Strachan: I thought the witness was doing some computing, your Honor.

The Witness: I think I am lost. What were you asking me?

Q. (By Mr. Strachan): Had you completed your calculation there?

A. I would say roughly——

Mr. Dixon: What was the last question? Maybe that would help, to have the last question read.

The Court: Break it. I don't think there is one pending anyhow. I asked a question and he answered me.

Q. (By Mr. Strachan): My last question was

(Testimony of Robert Hodge.)

what was the amount that was added to the capital stock and surplus account through this write-up?

A. There were adjustments back and forth, counsel. [2031] My net figure comes out approximately 436,000 after adjustments back and forth. In other words, this appraisal gave us certain figures, but there were adjustments for adding machines that were traded in and stuff like that back and forth, so instead of 343,000, it was approximately 436,000.

Q. And that 436,000 is included in the stated net worth appearing on the third page of Exhibit 64 amounting in the aggregate to 722,000 some odd dollars? A. As of what date, counsel?

Q. July 31, 1951.

A. I have a net worth of $622,194.65.

The Court: You must be looking at the wrong figure. Exhibit 64, page 3, shows the figure the witness gave.

Mr. Strachan: 622,000. That's right.

Q. That includes the 436,000 of appraisal write-up? A. That is correct.

Q. Do you have an opinion, Mr. Hodge, as to whether the appraisal write-up actually reflected the real value or the commercial value of the assets to which that write-up was applied?

A. I do not have any such opinion.

Q. You simply took the appraisal as an appraisal and translated it into——

A. I relied on a professional man's judgment, yes, sir, who is skilled in that business. [2032]

(Testimony of Robert Hodge.)

Q. You didn't know whether that appraisal was made for the purpose of ascertaining economic or commercial value or ascertaining some other standard of value?

A. No, sir. I took the appraisal as rendered by the Union Appraisal Company.

Q. Now we come to Exhibit 65. A comparison of the two income accounts and the losses shown thereon would indicate that the largest part of the loss for the full year ended January 31, 1952, occurred in the first six months of the fiscal year, did it not?

A. The statement would so indicate. There are a few items which are unusual which are in the first six months ending July 31, 1951.

Q. Would you care to mention some of those?

A. Yes, sir. The 25,000 odd deferred promotional expenses which were deferred in the previous year and were carried over and charged off in the first six months.

Q. Part of that selling expense?

A. Yes, sir.

Q. Were there any expenses incurred in the first six months that were carried over as assets for a later period?

A. Nothing other than the normal course of operations.

Q. Now, turning to the liabilities as of January 31, 1952, there is a note payable secured by the first deed of trust. That is the RFC loan, is that [2003] right?

(Testimony of Robert Hodge.)

A. That is the unpaid balance on the RFC loan, yes, sir.

Q. That was a loan that called for payment in monthly installments, is that correct?

A. That is correct.

Q. If you refer back to the liabilities shown as of July 31, 1951, it appears that the RFC loan was the same in amount at January 31 as it was at July 31, 1951. I will put that again.

It appears that the balance due on the RFC loan at January 31, 1952, was the same as at July 31, 1951. A. It is.

Q. It is true, is it not, that after the properties were reacquired, I believe in April of 1951, the company never made any of the monthly payments on the RFC loan, is that correct?

A. That is correct.

Q. Can you tell us the date of the last monthly payment that was made on the mortgage?

A. By the corporation?

Q. The corporation was making payments on the mortgage during the leasehold period, was it not?

A. It was making them as a part of the rent due to the then owners.

Q. Yes? A. Yes, sir. [3084]

Q. Can you tell us when the last such payment was made?

A. No, sir; I cannot. It was sometime prior to the acquisition of the property by the corporation. I can make that statement, but I do not know the

(Testimony of Robert Hodge.)

exact date.

Q. Can you tell us how many installments of the mortgage were in default after July 31, 1951, that is what I am trying to get at.

A. No, sir; I cannot.

Q. Do you have the date of the reacquisition?

A. By the corporation?

Q. Yes, sir.

A. On April 16, 1951, the company exercised the option under the agreement dated February 21, 1949. [2035]

Q. It would appear, would it not, that the mortgage installments for April, May, June and July were in default as of July 31, 1951?

Mr. Dixon: Appear from what, counsel?

Mr. Strachan: From his testimony.

Mr. Dixon: I don't think that appears from his testimony at all.

If the witness knows, he can so testify, but I don't think there is any basis for the question.

The Court: Overruled. If you know.

The Witness: I do not know exactly, or how many installments were in default at that time. The confirmation from the RFC does not so state.

The interest was paid to July, 1951, at the time we made our July 31, 1951, audit. [2036]

* * *

The Court: Wait, wait.

Do you have any information when the loan was due?

The Witness: The final balance was due on February 5, 1952.

(Testimony of Robert Hodge.)

The Court: All right.

The Witness: The payments of $1,500 a month from April, assuming they were delinquent from that date on, April, 1951, to February 2, 1952, would not amount to the unpaid balance at that time.

Q. (By Mr. Strachan): So there was a balloon payment?

A. There was a balloon payment, yes, sir; there must have been.

Q. And that mortgage provided, did it not, that upon a default in the payment of any installment the RFC could declare the entire loan due and payable? A. I do not have that knowledge, sir.

The Court: Well, that can be stipulated, can it not? [2037] That is the customary provision.

Mr. Strachan: I think we can also stipulate, can we not, that in September of 1951 the loan was declared due in its entirety under the acceleration provision?

Mr. Dixon: Well, that may be so, counsel. I don't know. I would have to ascertain that. If it is a fact, we will so stipulate.

Mr. Strachan: Let's stipulate to it subject to check, and if we find we are in error we will change the stipulation.

Mr. Dixon: We will check it, your Honor.

The Court: All right. Check it tonight and get that point cleared up.

Q. (By Mr. Strachan): Now, your balance sheet as of July 31, 1952, the last page of Exhibit

(Testimony of Robert Hodge.)

65, states the net worth as of that date to be $570,000? A. That is correct.

Q. The current assets as of that date were $55,000, the current liabilities $199,000. That would indicate an unsafe financial condition, would it not, in spite of the stated net worth of $570,000?

Mr. Dixon: If the court please, I object to the word "unsafe." The facts will speak for themselves and the jury may determine the situation.

The Court: Overruled. [2038]

The Witness: A very poor financial condition.

Q. (By Mr. Strachan): Do you have in your records there the date on which your balance sheet of Exhibit 65 was prepared and submitted?

A. I do.

Q. What was that date?

A. It was submitted on March 18, 1952.

Q. And that was the day before the petition for Chapter 10 reorganization was filed by the company, was it not? A. I do not know, sir.

The Court: We have had the date stipulated heretofore. It was in March some time, was it not?

Mr. Fisher: It was March 19th that the petition was filed.

The Court: Of '52, that the reorganization proceedings under Chapter 10, which are still pending, in which Mr. Walker is the trustee, was filed.

The Witness: I will add that I had no knowledge of such proceedings, as of the date this statement was prepared. Otherwise, it would have been mentioned in my report.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Otherwise what?

A. It would have been mentioned in my report.

Q. Was it your practice, when you were making these annual audits, to examine the minutes of the corporate proceedings? [2039]

A. It was.

Q. Down to the date of your report?

A. No. We would probably have examined at least through January 31, '52.

Q. Wouldn't you have examined them through February?

A. If they were made available to us, and if we had any knowledge of them, we certainly would have.

Q. Well, isn't it a fact that on February 13, 1952, over a month before your report was prepared, that a resolution was adopted by the corporation resolving that resort be had to Chapter 11—Chapter 10, of the Bankruptcy Act by the filing of the petition?

A. I am sorry. The last minutes that I had access to were dated January 8, 1952.

Q. Then you weren't aware of the minutes of February 13th which authorized the filing of the petition? A. No, sir. [2040]

* * *

The Court: The record will show the jury now absent. [2043]

* * *

The Court: All right. One other thing. I have been [2044] going over some of these instructions. I

merely throw this out because if we get this behind us it may save some problems.

There is a requested instruction by the defendants that the defendants, Sunkist, Exchange and Lemon, could not conspire among themselves. I am tentatively of a frame of mind to give that.

Mr. Dixon: We would definitely oppose that, your Honor.

The Court: That is why I wanted you to think about it. Here is my theory about it. Under the exemptions, these people could monopolize 100 per cent of the orange industry if they stuck to their knitting among themselves.

Mr. Dixon: That's right.

The Court: And if they could monopolize 100 per cent, I suppose they could conspire to that 100 per cent of it.

Mr. Dixon: I think there is a difference, your Honor.

The Court: I am talking about conspiring between themselves alone, without any other conspirator being involved.

Mr. Dixon: That's right.

The Court: I will think it over further.

Mr. Dixon: Pardon me, your Honor.

The Court: Well, let's have your point.

Mr. Dixon: The charge relates to restraining of trade and commerce in citrus juices, which is a by-product, and is not directly related to the product handled by the defendants.

The Court: I know, but being logical, let's follow [2045] through. If the exemptions would give

co-operatives, and they are all tied in together with one organization here, a right to monopolize 100 per cent of the orange industry, Valencia oranges, a fortiori, you could monopolize 100 per cent of the single-strength Valencia juice. It is pretty hard for me to see how you could ever complain about that as long as they stuck to their business. When they get out and contract with TreeSweet and Silzle, in my opinion, and I am going to rule as I have indicated, that it is a question of fact to a certain extent, but you let down the bars, and I am inclined, as far as dealing between themselves, to think they are still protected.

Mr. Dixon: Your Honor, I think particularly under the Section 2 count, it is important.

The Court: Monopoly?

Mr. Dixon: Assuming a monopoly, that they have a monopoly, and conspire to use the monopoly power that they have for the purpose of eliminating or restraining competition, which is technically a violation of Section 1, perhaps, the restraint of trade section, but Sections 1 and 2 under the cases do not make any distinction provided you assume the existence of the monopoly power or the power to exclude.

In other words, you may have a legal monopoly, no dispute about that. I wouldn't question the fact that Sunkist could have a legal monopoly and have all of the product. There [2046] would be nothing wrong about it.

But the question comes, assuming the existence of the monopoly, and your Honor may wish to instruct

on that question, I think the law is clear they cannot conspire together with any other co-op, for example.

The Court: I agree with you.

Mr. Dixon: Or with a subsidiary. The general law, in other words, applies to a co-op. If they are doing it for the purpose of violating the law. I think they can conspire together to do that, just the same as they can conspire with TreeSweet and Silzle if you assume the existence of monopoly power.

The Court: Well, I thought we would be able to dispose of that one in a hurry, but maybe not.

Mr. Strachan: It is all right with me. I think you should.

The Court: That's a nice little question there.

Mr. Dixon: It is, your Honor.

The Court: Your point is they might have a legal monopoly power, period, and it is all right?

Mr. Dixon: That is correct.

The Court: But if you try to misuse the power—well, give me an example in some other field. Let's take a patent. Can you draw an analogy there?

Mr. Dixon: In a sense that is analogous. In other [2947] words, they go beyond the scope of the legal authority.

The Court: Let's see if I can state it. If a man has three or four patents and he has a complete monopoly, and then he ties in sales with things that are not in the patent——

Mr. Dixon: Then he has exceeded the monopoly power granted to him.

The Court: I had better go back and look at something I wrote.

Mr. Strachan: But the distinction between that and the point of view your Honor has just expressed to me is this: a fortiori, our monopoly extends to the Valencia juice and we are not——

Mr. Dixon: No; it does not.

Mr. Strachan: We have a monopoly of the fruit. A fortiori, we have a monopoly of the juice and we are not trying by our monopoly of the fruit to tie in any other control or exercise any control over what is beyond the scope of our lawful monopoly.

The Court: It occurs to me it might be the same situation. It is possible to have a legal monopoly of the fruit. It might also be possible for them to have a legal monopoly of single-strength orange juice.

Mr. Strachan: That's right.

The Court: Then again we might run onto the question, have you misused it? [2048]

Mr. Dixon: That is correct. In other words, your Honor, so I make our position clear here, the plaintiff does not contend that the defendant or defendants cannot legally and properly enter into processing contracts, so-called.

The Court: I understand. I think the defendants understand that, too, by now.

Mr. Dixon: They certainly do.

The Court: And if they did it again, it might be done differently.

Mr. Dixon: TreeSweet does not necessarily have to be a party to this combination. I think they are,

and our position will be by entering into the contract, they are.

Silsle does not necessarily have to be a party to the combination and conspiracy, but they are by reason of the contract.

But going directly to the question that your Honor raised as to whether a co-op or two co-ops, or a co-op and a subsidiary can conspire together to violate the law, I think the fact that they are immunized, or put it this way, the fact that they are permitted to organize does not mean that they are permitted to organize to violate the law and the question is, of course, whether this constitutes a violation.

The Court: Perhaps you want to make some law on appeal?

Mr. Fisher: Should we have to appeal.

Mr. Strachan: I would rather make it in a nisi prius [2049] court.

The Court: All right. Let me see counsel in chambers for just a minute.

Adjourn until tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, Thursday, January 12, 1956.) [2050]

January 12, 1956—10:00 A.M.

The Clerk: No. 13788-C Civil, Winckler & Smith vs. Sunkist, further jury trial.

The Court: The record will show the jury in their proper places.

Mr. Dixon: May it please the court, yesterday we were asked to determine what the situation was with reference to the RFC obligation. We are willing to stipulate that, based on the letter of August 2 from the Reconstruction Finance Corporation——

The Court: August 2 of what year?

Mr. Dixon: 1951, that the loan was technically in default in September of 1951, and that the open account, unsecured loan, payable to the Bank of America, was guaranteed by Mr. Maxwell Rubin.

The Court: Satisfactory?

Mr. Strachan: The stipulation in regard to the guarantee of the unsecured loan is satisfactory.

I would like to have a little time to check on the status of the RFC loan.

The Court: All right. If you don't call it to my attention or to the jury's attention, we will assume that the stipulation is satisfactory in both parts.

Mr. Strachan: I think that is fair, yes. [2054]

The Court: All right. You may proceed.

Mr. Strachan: I was up to the point of taking up the witness' computations. There will be some changes.

The Court: That's right. Have you made some recomputations on 66, Mr. Dixon?

Mr. Dixon: Yes, your Honor, the recomputations have been made and changes made in Plaintiff's Exhibit 66, and also the changes suggested by the court or, rather, the additions suggested by the court upon 67 have been made.

The Court: All right. Now, which do you want to hand to the jury, Mr. Strachan?

Mr. Strachan: I didn't hear you.

The Court: Which one do you want to start with?

Mr. Strachan: I want to start with Silzle. I wonder if the revised copies of the exhibit are here.

The Court: Yes. All the copies have been made to correspond?

Mr. Irwin: Yes.

The Court: Come forward, Mr. Hodge.

The Clerk: Do you want the whole series given to the jury, or just 66 and 67? [2055]

ROBERT HODGE

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

The Court: Mr. Hodge, referring to Exhibit 66, where you made computations on the Silzle contract, which is in evidence as Plaintiff's Exhibit 25, you had originally taken a tonnage of 7,203 tons plus.

The Witness: That is correct, your Honor.

The Court: Now, it developed that some 527 or 528——

The Witness: Approximately 528 tons.

The Court: 528 tons were delivered prior to the contract and that the oranges processed under the contract was the difference in tons, namely, 6,675 plus.

The Witness: Yes, sir.

The Court: Have you made recomputations?

The Witness: I have recomputed the per ton figures on the corrected tonnage, your Honor.

(Testimony of Robert Hodge.)

The Court: And where the change resulted, you put it in-in ink?

The Witness: You will have to ask Mr. Irwin. I haven't seen them.

Mr. Irwin: The changes were made by me personally from the notes Mr. Hodge gave me.

The Court: The changes appear to be in ink on my copy. [2056] Mr. Hodge made the changes and you made the copies correspond?

Mr. Irwin: Yes, sir.

The Court: And they have been placed in ink on the copies?

Mr. Irwin: I made the copies correspond to the changes that Mr. Hodge gave me. [2057]

The Court: Pass 66 out to the jury.

Mr. Strachan: I don't have a revised copy. I have a retyping of it, but I don't have the one copy that shows the difference.

The Court: You use mine. Those pencil notations are mine. I just scratched on the front of it.

Mr. Strachan: I might say, your Honor, that we don't agree with the proposition factually that there were only 6675 tons processed under this arrangement. It is our position that the total processed under the arrangement, and that the basis for settlement, was changed after the first 528 tons processed. The arrangement was not reduced to writing until September. It is our position that the only difference between the 528 tons and the remainder is whether the peel and oil component would be accounted for in cash or would be accounted for in

(Testimony of Robert Hodge.)

kind. But the whole thing was under the processing arrangement.

The Court: You paid for the 527 tons on a different basis, didn't you?

Mr. Strachan: The basis of computing the return was changed after the 528, but it is our position that the entire quantity, whatever it is, 7,203, was under the processing arrangement.

The Court: All right. That will be a question of fact for the jury. [2058]

Mr. Strachan: Yes, sir.

The Court: You use my copy and let me have the copy that you had that was typed, Mr. Strachan.

Cross-Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Hodge, when you prepared Exhibit 66, a computation from the Silzle processing arrangement, and 67, a computation from the TreeSweet arrangement, did you notice that the allowances for processing, for selling costs, for advertising, and other items were different as between those two arrangements? A. I did, sir.

Q. In general, I believe the allowances to Silzle were lower than the allowances for the same items to TreeSweet, is that correct?

A. As to the processing I can so state. As to the others, it is not comparable, because the two are not expressed the same.

(Testimony of Robert Hodge.)

Q. As to the processing what is the——

A. As to the processing, TreeSweet was to be paid under the contract $35.57 a ton. Assuming that the figures contained in the EOP subpoena for processing, and so forth, apply only to the 6,675 tons, not to the 7,203 tons, the processing cost would be $32.30.

The Court: For Silzle? [2059]

The Witness: For Silzle.

Q. (By Mr. Strachan): As compared to what?

A. $35.57 for TreeSweet.

Q. Now, combining all other allowances provided for, you say you can't do them item by item, can you tell us what the total allowances, in addition to processing allowances, were under the Silzle, as compared with the TreeSweet contract?

A. Your Honor, has it been established that these figures that are rendered under the EOP-contract—subpoena, are for the 6,675 tons or are they for the 7,203 tons? I am not sure. The subpoena does not specifically state, and we have made computations both ways.

Q. Will you tell us what your computation is, assuming that the allowance applies to the 7,200, and compare that with TreeSweet, and then give us your computations as to what those allowances are on the other assumption, and compare those?

Mr. Dixon: Just a moment. I want the record to be clear, your Honor. It is my understanding that after discussion on the matter the defendants have stipulated that the 500 some odd tons were

(Testimony of Robert Hodge.)

paid for at the rate of $22.50 a ton, that the remaining 6,675 tons plus were covered under the particular provisions of this agreement.

If that is in dispute I would like to know.

The Court: There is no dispute, is there, as to the [2060] amounts paid? Your contention, Mr. Strachan, is that actually the whole tonnage was covered and was——

Mr. Strachan: By a processing arrangement.

The Court: ——and was subject to the contract?

Mr. Strachan: Right.

The Court: So there is no dispute that the 527 tons were paid for at so much a ton, at least credited in the books on that basis?

Mr. Strachan: That is right.

The Court: And that the remaining tonnage was put on the books in dollar amounts under the contract?

Mr. Strachan: That is right. [2061]

The Court: Now, the contention you make is that the whole transaction was in substance affected by or covered by the contract. It was all part of this one contract. That is what you mean, isn't it?

Mr. Strachan: That's right. Now, the witness has just said that he has made this computation assuming, first, that it was under the contract and, second, that it was not under the contract, and he has apparently got both figures available.

The Court: Well, that's all right, but I want to see what your contention is. I think I understand it. Your contention is that there was not a separate

(Testimony of Robert Hodge.)

sale to Silzle of 527 tons at $22.50, and then another transaction where there was a contract for processing. That what had happened was that the matter had started out on an oral agreement and some tonnage was delivered at $22.50, and later a contract was entered into, which contract was to make this all one transaction, although the original tonnage was put on the books at a certain figure and the remaining tonnage handled through the contract. Is that it?

Mr. Strachan: That is substantially it, with this slight modification, your Honor. The original 528 tons, as I understand it, was delivered and was not billed for as a separate sale. Finley and Silzle worked out an arrangement that there would be some fruit processed under this sort of [2062] an arrangement. They started in on the thing, and they processed the 528 tons before they had decided how they were going to render the accounting. They decided after the 528 tons was processed that they would have the oil and peel returned in kind and the juice component returned in cash. But by that time the 528 tons had been processed and disposed of. You couldn't allocate precisely what the peel and the oil component was, so they just got an aggregate figure that covered both, but it was all a part of a continuous transaction.

The Court: Now, let's go a bit further. Then is it your contention that after the contract was entered into then they went back and for the bookkeeping entries on the two sides of the ledger, that

(Testimony of Robert Hodge.)

is what Silzle had coming for processing and what EOP or Sunkist had coming when Silzle took the canned goods, they went back and applied the contract to the whole 7,000 tons, or did they go and say no, the 527 tons is $22.50 and the balance of the tonnage is figured out on the yardstick of the contract?

Mr. Strachan: Of course, this contract wasn't reduced to writing until some time in September. It is my understanding, so to speak, 528 tons represented eggs that were scrambled and you couldn't unscramble them, so the best you could do is reach an aggregate figure that would be the return for the entire fruit.

The Court: I know that, but I want to understand this [2032] other part. I think I see your legal position. In other words, if you are going to have to resist the Silzle contract, you want to resist one contract and not a sale of fruit at $22.50 and a contract for the difference, so you are going to contend this was all one transaction, and from your standpoint handle it in a bundle.

Mr. Strachan: That's right.

The Court: That is your legal position?

Mr. Strachan: Yes.

The Court: Now I am asking you about the factual position, which there oughtn't to be any dispute on. When they got ready to set this up on the books, and I think we ought to know this, there oughtn't to be any dispute about it, did they run the 527 tons through at $22.50, and make the neces-

(Testimony of Robert Hodge.)

sary charges, and put the balance of the tonnage through on the other yardstick of the contract as it was written finally? Or did they go back and apply the accounting yardstick of the contract, the written contract, to the 527 tons, and end it up in that manner?

Mr. Strachan: Well, as I understand it, the yardstick, as you call it, was not applied by segregating definitely the yield of oil and peel from the juice. The $22.50 was used as the return from both of those elements.

The Court: For the first 527 tons?

Mr. Strachan: That's right. [2064]

The Court: All right. Now we are agreed on that, and that is without prejudice to your right to contend this was all one package.

Mr. Strachan: Yes, sir.

The Court: We are just trying to find out what was done by the bookkeepers in adding it up. If that is true, then is it necessary to go into the two alternate methods of computation? The second computation, then, is the one we are concerned with as far as computations are concerned.

Mr. Strachan: No, I don't think so. It seems to me there are two different bases on which you can make a computation, the allowances and the returns, the allowances to Silsle and the return to EOP. One is that you deal with 7,203 tons as the total quantity, and you include the return on the 528 tons at $22.50 a ton in the income.

Under the other hypothesis, which we don't agree

(Testimony of Robert Hodge.)

with, you deal with the net after deducting the 528 as the tonnage, and use only the income from that lesser quantity.

I thought for the purpose of examining this witness, we could cover both hypotheses, so we could show what the allowances were on the one theory, and the allowances were on the other.

The Court: I can see the two theories. Maybe I don't see the same two you do. I want to let you test the witness' opinion. Maybe if we can figure out what the two [2065] theories are, then we can know what you are going at.

Mr. Strachan: Maybe we could get at it this way. The witness has said he computed it on two bases. Why don't we find out what the computations are that he made?

The Court: Let me inquire. When you took the first computation, you took the tonnage of 7,203 tons, disregarding the decimals, right?

The Witness: Yes, sir.

The Court: And you ran that all through under the provisions of the written contract?

The Witness: Based on the information furnished in the EOP subpoena.

The Court: That involved the tonnage?

The Witness: It gave the yields and the prices paid and all the various factors.

The Court: All right. Now, when you made the second computation based upon 6,675 tons, which would result after you deducted the 527 tons, on what basis did you make that?

(Testimony of Robert Hodge.)

The Witness: Well, I assumed that the figures that are furnished to us under the EOP subpoena, under the various subsections, applied only to the 6,675 tons, because in section K of the subpoena, it indicates to me that the $11,878.87 paid was paid by Silzle to EOP for the 528 tons. Therefore, I then assumed that these figures must not contain anything relating to the 528 tons. [2066]

The Court: So then you eliminated the 528 tons entirely and made a computation, then, based entirely on 6,675 tons?

The Witness: That is right, your Honor.

The Court: Without any reference at all to the 528 tons?

The Witness: That is right.

The Court: Now, there is a third alternative. I don't know how much time we are going to spend on this, but there is a third alternative. See if I can demonstrate it. Namely, this contract, of course, provided for original processing by Silzle, and then the option to buy the canned goods by Silzle. It had various parts to it. The third alternative, as I see it, is this: Starting out on the processing end of it, here is one pile of oranges that factually we admit was paid for at twenty-two dollars some odd cents a ton, as far as the credits were concerned, and there is the other pile of oranges that went strictly under the contract. That is as far as the oranges coming in. But when the oranges were made into juice and the cans were bought by Silzle, the cans were then purchased under the written contract. So

(Testimony of Robert Hodge.)

the second half of the contract concerned both piles of oranges.

Is that right?

Mr. Strachan: That's right.

The Court: So we have got three alternatives.

Does that fairly state the three situations? [2067]

Mr. Strachan: I think it does. And to cover the third alternative it seems to me that you should deal with the 7,200 tons, and the income received from the 7,200, which is the income from the 6,000 some plus the $11,000.

The Court: Well, then, let's do it this way, if it is agreeable: Let's see if the jury understands the three different ways of computing. Two of them are set forth in 66, and if you want to make a third computation on this third theory you may do so, or you may have the witness do it for you. Will that be all right?

Mr. Strachan: Yes. I think it might be a little laborious to have the witness do it, unless he can do it readily from the stand.

The Court: I mean during some recess.

The Witness: Judge, it could not be done.

Mr. Strachan: What did you say, Mr. Witness?

The Witness: It could not be done from the information that I have at hand.

Q. (By Mr. Strachan): You are not in position to make the third computation?

A. No, sir, I am not. I do not have the information to make that third computation.

The Court: Let's see if the jury understands

(Testimony of Robert Hodge.)

what we have all been talking about. Let me see if I can state Mr. Strachan's position, too, so we will know what he is [2068] getting at.

In a lawsuit one side offers proof, and another side offers proof. One side offers proof and makes certain contentions as to what it means; the other side has certain contentions as to what they think it means. Now, the plaintiff has offered the Silzle contract and they are relying on it as part of their case. Mr. Strachan, one of his positions is that this entire transaction with Silzle was one transaction. It started out under an oral agreement to buy some oranges for $22.50. Eventually the oral contract was written up and it became one transaction.

I don't know whether the plaintiff is going to contend that there were two, or not.

Mr. Strachan is going to contend, in any event, that there was only one transaction.

The plaintiff is going to contend, No. 1, that there was a sale of oranges to Silzle at $22.50 a ton, and a processing contract?

Mr. Dixon: If it please the court, I will be very glad to try to answer that question. I tried to get it from Mr. Finley, and all I can say is that I will leave that question to the jury to determine. It is our contention, to specifically answer your question, that the contract provides that as to the five hundred some odd tons delivered, they should be paid for at the rate of $22.50 a ton, and that they were paid for [2069] on that basis; that the balance apparently were covered by this other arrangement.

(Testimony of Robert Hodge.)

Whether the five hundred some odd tons were to be treated differently than the twenty-two fifty, I don't know.

The Court: Then we have that issue in the case. So that the plaintiff at least has kept the door open that it is going to argue that there was a sale of 527 tons at twenty-two fifty, and a processing contract. The defendant is going to contend that because this contract came along later, and because it referred back to certain things, and because all the goods manufactured for all the oranges came under the contract, as far as the repurchase of them were concerned by Silzle, that this was one transaction.

Is that right?

Mr. Strachan: That is right.

The Court: This is going to be a matter for you to decide. It depends somewhat on the contentions that are made during argument, but on these computations there ought not to be any confusion between us.

The first computation that was made, as the witness told you, based upon the way he read the subpoena, he took the total tons, 7,000 tons, and ran it through on that basis. Now, he has made a second computation in which he subtracted the 527 tons and left 6,675, and he ran it completely through on that computation, and he put at the very last line of [2070] the amended——

Mr. Irwin: If your Honor please, you are using a mimeographed copy and the last line is not on the exhibits which the jury is using.

(Testimony of Robert Hodge.)

The Court: All right. Strike the last out, then. So he ran the tonnage through at 6,675 and he got a result. Now, there is this third alternative that we talked about, which the witness says maybe can't be computed, but the third alternative involves the fact that this contract was a two-sided contract. First of all, the contract provided that Silzle would process goods, oranges into juice in cans, and the oranges and the canned juice were to be the property of Exchange Orange. But there was a second part of the contract that said Silzle could buy that canned goods at a certain price. Since both piles of oranges went into cans, and since all these cans were bought by Silzle under the part of the contract providing for purchasing canned orange juice—that is right, isn't it, all was purchased?

Mr. Strachan: That is right.

Mr. Dixon: It was all purchased, yes.

The Court: Then you have a situation—whether it can be computed, or not, I don't know, but you have a situation as far as the oranges flowing to Silzle, you had some going at a certain price, some going under the strict yardstick of the contract, but you had the purchase of the canned goods [2071] all under the contract by Silzle. Because Silzle exercised its option to buy all this canned goods. Whether you could make a computation on that to take those factors into account, I don't know, but that is what we speak of as this third theory.

Does that fairly state it?

Mr. Strachan: I believe it does, your Honor.

(Testimony of Robert Hodge.)

The Court: Whether we can help you or not I don't know. You are going to have to decide these facts.

Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): Mr. Hodge, what were the total allowances for processing, for sales expense, for brokerage and everything, to Silzle under the Silzle agreement, according to your first computation?

A. According to my first computation the total allowances were $40.26 per ton.

Q. And when you revised the quotation to reflect the effect of the 528 tons, what was the result you got with respect to the total allowances?

A. The total allowances, including the processing costs, sir?

Q. Yes.

A. The total allowances, including processing cost, and the various allowances under the contract, were $43.45.

Q. What were the processing costs alone according to— [2072] allowances, alone, according to the two computations?

A. Under the computation of 7,203 tons being under the contract the processing allowance was $29.73 a ton; and under the computation at 6,675 tons that were processed under the contract the processing cost would be $32.30 a ton.

Q. All right. Now, will you tell us what your computations showed with respect to the processing allowance under the TreeSweet?

(Testimony of Robert Hodge.)

The Court: Does the jury have TreeSweet, too?

Mr. Strachan: I don't know. I think they should have.

The Court: Then give Exhibit 67 to the jury.

It has added to it only a couple of lines which the court directed be put on.

(Question read by the reporter.)

The Witness: My computations under the TreeSweet contract for the allowance for processing cost was $35.57 a ton.

Q. (By Mr. Strachan): That is how much higher than the Silzle allowances for that item?

A. On which basis, counsel?

Q. What? A. On which basis?

Q. On each basis. [2073]

A. The difference on the basis that there were 7,203 tons processed on the Silzle agreement is $29.93, and the processing allowance under the TreeSweet contract of $35.57 is $5.64 a ton.

Q. That is, the processing allowance of TreeSweet is that amount higher than the processing allowance of Silzle on that basis?

A. That is correct.

Q. Now, the other basis?

A. On the other basis the difference is $3.27 a ton higher than—may I restate that? Under the second computation the allowance was $303.27 greater under the TreeSweet contract than it was under the Silzle contract.

Q. On a per ton basis?

(Testimony of Robert Hodge.)

A. On a per ton basis.

Q. Now, as to the total allowances, will you state how much higher TreeSweet was than Silzle on each of the bases?

A. On the basis that there were processed under the Silzle contract the amount of 7,203 tons, the allowances—the total processing cost and allowances under the contract to TreeSweet were $8.19 more than they were under the Silzle contract.

Under the second computation, they were $5.00 more than they were under the contract with Silzle.

Q. Now, you testified at the conclusion of your direct [2074] examination that based on the terms of the TreeSweet processing agreement, the allowances and other items provided for therein, you had made a computation which indicated that had Winckler & Smith had such an arrangement there would have been a profit for the year ended January 31, 1952, of $25,000. Do you recall that testimony? A. Yes, sir, I recall that testimony.

Q. Did you make a like computation to show what the profit or loss, if any, would have been had Winckler & Smith had a processing contract similar to the Silzle agreement? A. I did not, sir.

Q. Well, now, on the one basis of figuring the return from the Silzle processing agreement, it would have produced about $8.00 per ton less in allowances than would the TreeSweet contract, is that correct?

A. In allowances, processing cost, and so forth, yes, sir.

(Testimony of Robert Hodge.)

Q. If you apply the $8.00 lower allowances of Silzle's contract to the 12,000 tons of fruit, that would mean that the allowances to Winckler & Smith under the Silzle contract would have been approximately $96,000 less than you computed them under the TreeSweet contract. Is that a fact?

A. No, sir. You cannot do that. There are too many—there are other factors that enter into the computation, because in the Silzle contract provision there is included three [2075] items, 12½ per cent for sales expenses, brokerage, and profit. I haven't any way of determining how much of this allowance is for each item for comparing such items to Winckler & Smith's operations.

Q. Could you make the computation to show the profit or loss for processing under the Silzle arrangement?

A. Not with the information I have available now.

Q. What information did you have with respect to the allowances of TreeSweet over and above the information you have with respect to the allowances to Silzle? A. The items are stated differently.

Q. But you know what the total allowances were, do you not?

A. Yes, sir. I also know what the total sales prices were per ton. They are different, too.

Q. What is the difference in that respect?

A. Based on the computation that the contract, the Silzle contract covers 7,203 tons, the sales price

(Testimony of Robert Hodge.)

as computed by me per ton is $9.89 greater for TreeSweet than it is for Silsle.

Based on the computation that the Silsle contract is for 6,675 tons, the TreeSweet sales price per ton as computed by me is $5.71 per ton higher than the Silsle computation made by me.

Q. As I understand it, basing your computations on the [2076] TreeSweet agreement, you took the agreement which indicated the highest selling price and also the highest return of allowances.

A. That is true, sir.

Q. Are you able to explain why it was that the allowances made under the TreeSweet contract were different from and higher than those allowances under the Silsle contract? A. I am not, sir.

The Court: Let me ask a question that comes to me immediately while we are discussing this. The Silsle oil and peel recovery was considerably less than the TreeSweet oil and peel recovery?

The Witness: Very much so, sir.

The Court: One was $20.81 and the other was $4.08 on your revised computation on 6,700 tons, right?

The Witness: Yes, sir.

The Court: Therefore, would you have an intangible there unless you know the effeciency of the Winckler & Smith oil and peel recovery?

The Witness: You certainly would sir. I mean that would be quite a factor as shown by the difference in the Silsle recovery and the TreeSweet recovery.

(Testimony of Robert Hodge.)

The Court: So that if Winckler & Smith had as efficient oil and peel recovery as TreeSweet, that would be one thing, and if they had one that was inefficient and wouldn't recover [2077] as much, such as Silzle, that would be another factor?

The Witness: That would be. A great deal would also depend on the quality of the fruit.

Mr. Strachan: As I recall the testimony on that subject, your Honor, Mr. Winckler testified to a figure on efficiency with respect to oil and peel recovery that was approximately the same as Silzle. It was down around $4.00 a ton. It was nowhere near the $10 a ton TreeSweet realized.

Mr. Dixon: I don't recall the figures. I don't mean to interrupt, counsel.

Mr. Strachan: That's all right.

Mr. Dixon: I think the peel and oil figures were taken into consideration and allowances made for that in these computations as stated in the exhibits.

The Court: Well, I don't recall, either, what the testimony was on that subject. All right. Go ahead.

Q. (By Mr. Strachan): Mr. Hodge, were you aware of the fact that various allowances under the Silzle contract and under the TreeSweet contract were arrived at from a determination with respect to the actual expenditures and costs of processing based on their method of operation?

A. No, sir. I merely took my figures from the contracts and the FOP subpoena.

Q. You weren't aware of the fact that the Silzle allowances were based, their allowances for manu-

(Testimony of Robert Hodge.)

facturing and [2078] for advertising and production and those things, were based on representations as to what the Silzle costs were, and that the allowances for TreeSweet were likewise based on an ascertainment of what their costs were, which were higher for certain of these items? Did you know that? A. I was not aware of that, sir.

Mr. Dixon: If the court please, I don't think there was any evidence on that with reference to Silzle. I think there was some with reference to TreeSweet.

The Court: That will be a matter for the jury to recall the testimony.

Mr. Dixon: All right.

Q. (By Mr. Strachan): Your computation as to the results which might have been obtained by Winckler & Smith if it had operated under the arrangement such as TreeSweet operated under, a part of your computation depends on the fact that you used Winckler's operating costs as being something under the operating costs allowed by the TreeSweet contract, is that correct?

A. That is correct, sir.

Q. Now, I would like to go over with you, Mr. Hodge, the manner in which your computation arrived at the $25,000 profit. That $25,000 profit was arrived at through deducting, making deductions from gross profit for—one item was general administration, is that correct? [2079]

A. The excess of the 1952 general administrative

(Testimony of Robert Hodge.)

expenses over those in 1950 was part of the computation, yes, sir.

Q. Specifically, as I recall it, you allowed $3.07 per ton as one of the items, is that correct?

A. That is part of the computation of the processing cost which I used in this computation and represents the per ton cost of the general administrative expenses during the year ended January 31—I am a little confused because you talk of one season whereas I am accustomed to dealing with fiscal years. The fiscal year ended January 31, 1950.

Q. Now, that was about $37,000, wasn't it?

A. It was a $37,000 difference between the two years, yes, sir.

Q. And then there was an item in there of $3.07 per ton on 12,000 tons, roughly another $37,000 for administrative costs, is that correct?

A. No, sir. That is in the amount of $56,417.38 in that year for administrative costs.

Q. Let's see if we can get at it another way. As I understand it, you had total selling and administrative expenses in your computation of $184,000 roughly, is that correct?

A. Will you repeat the question? I didn't quite understand it.

(Question read by reporter.)

The Witness: In the computation, for what, counsel? [2080]

Q. (By Mr. Strachan): In the computation that brought you down to the $25,000 of profit per year.

(Testimony of Robert Hodge.)

A. I have a total figure in this computation, according to my papers, of general administration expenses of $93,713.49 and selling expenses of $87,652.44, a total of $181,365.93.

The Court: That is not for '49?

The Witness: That is for '52. I adjusted the computation to take into consideration the increase in the selling expenses and the increase in the general administrative expenses.

Q. (By Mr. Strachan): In arriving at your $25,000 of profit, you subtracted that one hundred eighty some thousand dollars from what figure?

A. $56,417.38 is represented in Winckler & Smith Citrus Products Company's processing cost in the year ended January 31, 1950, and is in the $34.06 figure that I have used as Winckler & Smith Citrus Products Company's processing cost for the year ended January 31, 1950. The balance is deducted later on in the computation as actual selling expenses for the year were $87,652.40, the excess of general administrative expenses for the year 1952 over 1950 of some $37,296.11.

Q. You said your total selling and administrative expenses was how much, one hundred eighty some thousand? A. For the year 1952?

Q. As used in your computations. [2081]

A. Yes, I used the figure of $181,365.93 in making this computation for general administrative expenses and selling costs.

Q. When you deduct that general administration and total selling costs from what we might call gross

(Testimony of Robert Hodge.)

profit, is that the way you arrive at the $25,000 profit for the year?

A. No, sir. My computation is merely to show what could have happened had Winckler & Smith have had the 12,000 tons available to them under the same terms as TreeSweet did under their contract. It is not subtracted or added to any profit made by the company. It would have changed the results, had they been allowed the 12,000 tons for processing as TreeSweet was under their [2082] contract.

* * *

A. Before we commence, Judge, my attention has been directed to a question that I must have misunderstood. Counsel asked me if my computation of the TreeSweet sales price per ton was based on the highest sales price.

It was not. It was based on my computation obtained from the figures furnished in Exhibit 11.

Q. I don't think I said "highest." I said in selecting the TreeSweet arrangement for the purpose of your computation you selected the arrangement under which the price was higher than the price under the Silzle contract. And that is what you did, didn't you? A. The sales price?

Q. The price at which the processor was to buy, and presumably to sell the finished product.

A. As I understand the question, you asked sales price, counsel.

The Court: Your question was, that you asked, Mr. Strachan, as the witness recited. You asked him

(Testimony of Robert Hodge.)

if he hadn't taken the highest price in the Tree-Sweet contract. And I was trying to think what that possibly meant, so I was confused.

Let's straighten the thing out now.

Q. (By Mr. Strachan): What was the price of the finished goods to be under the TreeSweet contract?

Mr. Dixon: What do you mean "the price," counsel? Price [2083] paid by TreeSweet?

It was actually the amount paid, as I understand it, counsel, the total amount. Is that your question?

The Court: What did you take in figuring the TreeSweet computation?

The Witness: In figuring the TreeSweet computation of the Sunkist price as shown under item 8, on Exhibit 67, the figures are those obtained from Exhibit 11, and the computation is made therefrom.

Q. (By Mr. Strachan): And what is that price?

A. And that price per ton as shown on page 3, item 12, is $62.74 a ton.

The Court: What did you do—take the figure at which TreeSweet exercised its option and actually bought the canned goods?

The Witness: No, sir. We took the figures as shown in Exhibit 11 as to what Sunkist had paid for the canned juice, which represented 85 per cent of the sales price——

Mr. Dixon: You mean TreeSweet?

The Court: You said "Sunkist had paid."

The Witness: Sunkist received, then.

The Court: From TreeSweet?

(Testimony of Robert Hodge.)

The Witness: Was to have received from TreeSweet under the contract, and what they did. I am balled up. May I start over again? [2084]

The Court: Yes.

The Witness: The amount as shown under item 4 in Exhibit 67 is the amount TreeSweet paid Sunkist for the canned juice. This amount—may I start again?

As shown under item 8 the total allowances and amount paid by TreeSweet was $1,287,792.16, which represented 85 per cent of the selling price that TreeSweet sold the canned juice for. So the total sales price must have been, according to my computations, $1,515,049.65. That divided by the number of tons as shown under item 12 gives us a computed per tonnage price of $62.74. [2085]

The Court: Well, you took from Exhibit 11, which was the response to the subpoena, the actual amount of money that, by the bookkeeping entries, was charged to TreeSweet by Sunkist when TreeSweet took the goods?

The Witness: Yes, sir.

The Court: Then you made a computation.

The Witness: Made the computation from the amound paid—TreeSweet actually paid to Sunkist for the canned juice, plus the amount that Exchange was to have paid TreeSweet for the processing. In other words, the figure actually paid to Sunkist for the canned juice by TreeSweet was net of the credit for the amount due them under the processing end of the agreement.

(Testimony of Robert Hodge.)

The Court: Is that what you are getting at now?

Q. (By Mr. Strachan): Now I would like to get the comparable figure under the Silzle contract.

A. The comparable per ton price under the Silzle contract under the 6,675 ton computation would be $57.03. Under the 7,203 computation, it would be $52.85.

Q. The price of the canned juice under the Tree-Sweet contract was higher than Silzle's per ton basis, is that not correct?

Mr. Dixon: If the court please, the price paid under this contract, actually paid, the record will show that, by TreeSweet to Sunkist was a total amount of X dollars as set [2086] forth in the exhibit. That amount was not, however, the actual selling price or the price at which the goods were sold by Sunkist to TreeSweet, because the amount represented in there, being the amount paid by TreeSweet, did not take into consideration the 15 per cent discount off the actual sales price of Sunkist, so that you have to take the figure that was given in Exhibit 11 as being 85 per cent of the selling price to compute the selling price at which the goods were actually sold. I think that is where the confusion comes in.

The Court: The objection is sustained to the form of the question. You are trying to compare, I think, Mr. Strachan, the first figure—let's see if I am right.

On Exhibit 66, page 3, which involves Silzle, you have under 11 (a) at the top of the page a gross

(Testimony of Robert Hodge.)

figure per ton before certain deductions, which on the modification is $57.03, and on the original computation is 52——

The Witness: $52.85, sir.

The Court: You are going to compare that with Exhibit 67, third page, Section 12 (a), where the price per ton before the deductions is $62.74. Is that the comparison you want to make?

Mr. Strachan: Right.

The Court: You used the word paid, and that is why your question was defective, being very technical about it, because this is just one step in the proceedings. If you [2087] want to have a comparison made between those figures, it is entirely all right. Don't use the word "paid."

Q. (By Mr. Strachan): The Sunkist sale price per ton under the TreeSweet contract was approximately $10 higher than the Sunkist sale price under the Silzle contract, is that correct?

The Court: If you add to it "before deductions were made as shown on the exhibit."

Mr. Strachan: Yes.

The Witness: As computed.

Q. (By Mr. Strachan): As computed by you?

A. As computed under the computation that there were 7,203 tons processed under this agreement; and as computed under the processing of 6,675 tons, that is not correct.

Q. So when you elected to make your computation under the TreeSweet contract rather than the Silzle contract, you made that computation on the

(Testimony of Robert Hodge.)

basis of the contract that had the higher Sunkist sale price, is that correct?

A. As compared between the two contracts?

Q. Yes, sir. A. That is correct.

Q. And in electing to make your computation under the TreeSweet contract rather than the Silzle contract, you chose the TreeSweet contract which had the higher allowances than the Silzle [2088] contract? A. That is correct.

Q. Do you know whether the Winckler-Smith business is more nearly comparable to TreeSweet or to Silzle? A. I do not know, sir.

Q. Do you know that with respect to the volume of operations?

A. I am not familiar with the TreeSweet operations or the Silzle operations.

Q. You don't know anything about the cost of sales as between the two? A. No, sir.

Q. You don't know anything about the character of market on which the two sold? A. No, sir.

Q. Whether one had private label business as compared with the other one that sold under its own name? A. No, sir.

Q. In your computation you used as the brokerage expense the amount of approximately $37,500—I'm sorry.

A. No, sir. I revised that to $22,500.

Q. Originally you had $37,500?

A. That's right, sir. [2089]

Q. How did you arrive at that brokerage?

A. That was approximately three per cent of

(Testimony of Robert Hodge.)

the selling price that would have been received for the 12,000 tons had it been made available to Winckler & Smith Citrus Products.

Q. That is on the basis of your computation the selling price of the product, of the 12,000 tons, would be roughly $750,000? A. That is correct, sir.

Q. All right. Now, that we will call the gross sales from the 12,000 tons, is that correct?

A. That is correct.

Q. Now, will you tell us what you deducted from the $750,000 gross sales as representing the cost of sales of that 12,000 tons?

A. As my testimony on Tuesday, I did not approach the problem in that manner.

Q. Well, approaching it in that manner will you compute what the cost of sales would be from the data before you?

A. I do not have sufficient information to do that, sir.

Q. What is lacking?

A. It just wasn't done that way, sir.

Q. I know, but can you now from the data before you tell us what would be the cost of sales?

Mr. Dixon: Do you mean of the $750,000 estimated sales, [2090] counsel?

Mr. Strachan: That is right.

Mr. Dixon: All right.

Do you understand the question?

The Witness: I understand the question.

It would take considerable study, counsel, in order to arrive at this figure that you have asked for. It

(Testimony of Robert Hodge.)

could be done. I don't know how soon or how much time it would take, but it could possibly be done.

Q. (By Mr. Strachan): Well, ordinarily when you set up an income account you set it up showing sales, less cost of sales, don't you?

A. This was not an attempt to set up an income account. This was a computation——

Q. But you could do that, could you not?

Mr. Dixon: Let him finish his answer, counsel.

The Court: Yes, finish your answer.

The Witness: This was a computation to estimate the profit that would have been made by Winckler & Smith Citrus Products for the year ended January 31, 1952, had they been provided with 12,000 tons of fruit under the same terms and conditions as TreeSweet were provided under their contract.

Q. (By Mr. Strachan): Now, wouldn't it be possible, Mr. Hodge, starting out with your gross sales of this 12,000 tons of fruit, $750,000, to compute for the [2091] jury what the cost of sales of those sales would be?

A. It could be done. It would take some time, as I stated before.

Q. Then, after you had computed the cost of sales, if you were to deduct that from the $750,000, you would get what is sometimes called a gross profit, wouldn't you, before selling and brokerage and that sort of thing?

A. On this particular transaction, yes, sir, it could be done.

(Testimony of Robert Hodge.)

Q. You didn't do that? A. No, sir.

The Court: As I understand, there were available alternate methods of making this computation?

The Witness: Judge, there would be as many different methods of making this computation, probably, as there are accountants.

The Court: You took one method?

The Witness: I took a method, that is right, sir.

Q. (By Mr. Strachan): If you were to proceed along the lines that I am suggesting, you would take from the gross profit what is called selling expense, would you not? A. That is correct.

Q. You didn't ascertain selling expense?

A. I made allowance in my computation for the selling expense in the year ended January 31, 1952. [2092]

Q. You didn't make a computation for the selling expense for the 12,000 hypothetical tons of fruit that would have been sold for $750,000, did you?

A. Yes, sir, I did. I computed the brokerage thereon and added to the actual selling expenses of the company during that period.

Q. You didn't subtract that from the gross profit, did you?

A. I subtracted it from the $25,000 estimated profit, yes, sir.

Q. You subtracted what from the $25,000 estimated profit?

A. In making the computation of the $25,000 profit, which I testified to——

(Testimony of Robert Hodge.)

Q. You said from that 25,000 profit you subtracted what? A. Please let me finish.

The Court: He is trying to explain. I think he misstated. Go ahead.

Mr. Strachan: I think he did too.

The Witness: I was trying to explain how it was arrived at.

The $25,000 estimate that I made was after deducting the actual selling cost for the year ended January 31, 1952, plus an estimated additional amount that would have been paid for brokerage for selling this additional fruit.

The Court: But you didn't subtract that from the end [2093] result of the profit you got; you subtracted it before you got the end result?

The Witness: That is true.

The Court: That is where you misstated.

Q. (By Mr. Strachan): What selling expense did you say you took into account in your computations?

A. I took the actual selling expenses for the year ended January 31, 1952, plus an estimated amount of brokerage that would have been paid on these additional sales, had they been made.

Mr. Strachan: I would like to have copies of Exhibit 65 distributed to the jury.

The Court: Can the jury pass in these other sheets that they have, Mr. Strachan?

Mr. Strachan: I should think so, yes, sir.

The Court: Let's pass those in, and then you won't have too many to shuffle.

(Testimony of Robert Hodge.)

Q. (By Mr. Strachan): Do you have a copy of the income account for the year ended January 31, 1952, before you? A. Yes, sir, I do.

Q. As I understood your last answer, you said with respect to this computation your selling expense was $87,000, the actual selling expense as shown on that exhibit, plus brokerage on the $750,000 of added sales; is that correct?

A. That is correct, sir. [2094]

Q. The 87,000 was sales expense attributable to a gross sales of 670,700 actually made during the year, is that correct?

A. No, that is not exactly correct, counsel. The selling expenses are more or less fixed. You have men that are going to be in your employ, key employees that you keep whether you sell anything or not.

Q. But taking your income account for the year ended January 31, 1952, Mr. Hodge, at face value, it shows, does it not, that on sales of $671,000 you had selling expense of nearly $88,000, is that correct?

A. The selling expenses are not based on your sales.

Q. But isn't that the selling——

A. The only item in that selling expense that is directly based on the amount of the sales you make is the brokerage commission.

Q. Yes, but there were other sales expenses recorded in the books, were there not?

A. There certainly were.

(Testimony of Robert Hodge.)

Q. About 88,000, less the brokerage?

A. That is correct.

Q. Those sales expenses were incurred in the year in which the actual sales were $671,000?

A. No, sir. Some 24,000 of them, if you will recall previous testimony, were carried forward from a promotional [2095] program that was carried on in the previous year.

Q. In your computation you didn't, except for brokerage, allow for any increase in selling expense due to the addition of the 12,000 tons?

A. That's right, sir.

Q. You made no such allowance in the computation?

A. I estimated that there would be little or no increase in other selling expenses other than brokerage.

Q. In your computation, what did you allow for administration expenses?

A. I allowed the actual amount expended in the year ended January 31, 1952.

Q. How much was that? A. $93,713.49.

Q. I believe your testimony on that was that as to administrative expense you took the excess of general administrative expense for the year 1952 over the year 1950. The general administrative expense in 1952 was $93,700. The general administrative expense for 1950 was 56,000, or a difference of 37,000.

Will you tell us precisely what you did in that regard?

(Testimony of Robert Hodge.)

A. The general administrative expenses for the year ending January 31, 1950, were included in the computation of the processing costs for that [2096] year.

Q. Processing costs?

A. In the processing costs as comparable to the processing costs under the TreeSweet terminology. That was my conception of it.

So those expenses were included in Winckler & Smith's processing costs under my computation, because I used the year 1949 to estimate their processing costs on a per ton basis, because that was the year that they did have a Valencia season. In order to be as conservative as I could in my computation, I then deducted the excess of such expenses, general administrative expenses, in the year ending January 31, 1952, later on in my computation. So the whole $93,000 worth of expenses in the year ended January 31, 1952, for administration expenses have been reflected in my computation.

Q. Then for the purpose of your computation you assumed that, without additional administration expenses in the year 1952, you could have processed and sold the $750,000 of juice from 12,000 tons of oranges, is that correct?

A. That is correct, sir.

The Court: Let's see if I understand you. You took the position that under the TreeSweet contract where TreeSweet was paid for processing the juice, its administrative expense was covered within that allowance made it for processing, right?

(Testimony of Robert Hodge.)

The Witness: Yes, sir.

The Court: And so in making the comparison you had to [2097] assume that the same thing was done by Winckler & Smith?

The Witness: That is true, sir.

The Court: But Winckler & Smith's financial statement, of course, had showed all these administrative expenses as expenses which were deducted from the gross profit, if any?

The Witness: That is true, sir.

The Court: So you had to make allowance for the fact that under this kind of contract, if you are making a comparison, a substantial portion of this administrative expense would have been covered in the contract?

The Witness: That is true, sir, under the processing costs to be recovered.

The Court: All right.

Juror Weiner: Under what administration was the Winckler & Smith——

The Court: I can't hear you.

Juror Weiner: Under what administration was the Winckler-Smith Company? Was Mr. Winckler running it or Mr. Walker, the trustee, running it?

The Court: When?

Juror Weiner: In 1952.

The Court: Mr. Winckler was president on up until some time in 1952 when the petition for reorganization was filed, and then Walker came in in 1952, after January 31 of 1952. We are not con-

(Testimony of Robert Hodge.)

cerned with the trustee's operations here at [2098] all.

Juror Weiner: Thank you.

The Court: This involved the year in 1951 from February, up to February 1, 1952, when the corporation was operated under its own officers.

Juror Weiner: Thank you.

The Court: Go ahead.

Q. (By Mr. Strachan): As I understood your direct testimony, you were adding up the costs involved, and you said at one point that to the cost you also added general administrative expense, $3.07 a ton, is that correct? A. That is true, sir.

Q. That would amount to how much on the 12,000 tons, roughly?

A. That was not computed on the 12,000 tons. In my attempt to compare the processing costs allowed TreeSweet under the contract, I was merely trying to bring Winckler & Smith's costs, as best I could, into the same basis as allowed under the TreeSweet contract.

Q. Well, one of the costs——

A. This $3.07 was not computed on 12,000 tons. It was computed on the actual tonnage processed by Winckler & Smith during the year ending January 31, 1950, on which these average costs were based.

The Court: Let's see if I understand you there. In [2099] 1950 you took the total tonnage and you worked out an average cost per ton for processing?

The Witness: That's right, sir.

(Testimony of Robert Hodge.)

The Court: When you had to compare with this situation in the year ending 1952, the canning year of 1951, when you were going to compare with the TreeSweet contract, you had two situations. You had work processed under this contract, supposedly like TreeSweet, and you had other canning done by the company.

The Witness: That is true, sir.

The Court: The work done by TreeSweet, the administrative costs were recovered in the cost of processing.

The Witness: Yes, sir.

The Court: You then had to arrive at what was the cost of processing the other products done by the company apart from the suppositious contract.

The Witness: That is true, sir.

The Court: So then you went back to the year ending January of 1950, where there had been sales of $1,367,000, and that is where you got the figure of $3.07 a ton processing costs?

The Witness: For general administrative expenses.

The Court: For general administrative expenses.

The Witness: Yes, sir.

The Court: So you applied the $3.07 against that part [2100] of the production that the company was doing on its own, and then you used a system similar to the TreeSweet contract for the administrative costs?

The Witness: In the processing.

The Court: In the suppositious contract?

(Testimony of Robert Hodge.)

The Witness: Yes.

The Court: So that was included?

The Witness: That is true.

Q. (By Mr. Strachan): You say you didn't multiply that $3.07 by 12?

A. No, sir. That $3.07 is arrived at by dividing the total administrative expenses for that year by the tons processed that year.

The Court: By that year you mean the year ended 1950?

The Witness: 1950, right, sir.

The Court: I thought I made it clear. The witness has just explained that the $3.07 was not applied to the 12,000 tons, but was the figure from the year before, or two years before, which was applied to the excess product other than under the supposititious contract. [2101]

Mr. Strachan: Well, if that be the fact, I was misled, I think, by this passage or these passages in the direct testimony.

On page 1895 the witness, after having said that he took the ingredients cost and the cans and the cartons and the labels and the goods, got a total there, plant expense, he said,

"To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

"Taking that from the amount paid TreeSweet for processing give Winckler & Smith a profit of $1.51 per ton, or a total of $18,120."

(Testimony of Robert Hodge.)

There, I say, he clearly multiplied a number in which that $3.07 per ton was a factor by the 12,000.

The Court: Let's see if the witness can straighten us out on it.

I see justification for your position, and I have in mind the explanation.

The Witness: I don't recall exactly what I said, but I certainly took the processing cost for the year ended January 31, 1950, divided each and every item by the tons processed in that year to arrive at what I computed to be a processing cost comparable to the processing cost set forth in the TreeSweet contract. [2102]

The Court: And applied that figure?

The Witness: And compared that figure with the amount allowed TreeSweet under the processing agreement.

The Court: In addition to comparing it what did you do? Did you multiply it times the number of tons that the company, Winckler & Smith, under this suppositious year was processing on its own?

The Witness: No, sir. I am trying to compare the processing costs of TreeSweet as computed under the contract, with a figure that Winckler & Smith could have processed the fruit, the same as TreeSweet did. What is TreeSweet's processing cost I have determined under the contract, and I am trying to compute a similar figure for Winckler & Smith. To get that figure I went back to the year 1949, because it was a true Valencia season, com-

(Testimony of Robert Hodge.)

puted the various items that go into the processing cost, and arrived at a total of $34.06.

Does that clear it up?

The Court: Go ahead.

Q. (By Mr. Strachan): Now, I would like to ask you if this is a correct statement of what you did in your computations, and I will read from page 1895:

"My computation was arrived at in this way"——

Mr. Dixon: Counsel, may we first determine what computation you are referring to? The $34.06, or what is the computation figure so we start with something that we all understand? [2103]

Mr. Strachan: I am just asking if this is a correct statement of what he did.

Mr. Dixon: Well, I object to it on the ground that it is wholly irrelevant and immaterial unless it is made understandable.

The Court: Sustained and overruled, both.

I think we should identify what particular computation this is, because he made a series of computations.

Mr. Dixon: That is right.

The Court: But the objection is overruled on the ground——

Mr. Dixon: I withdraw my objection on the other basis, your Honor.

Q. (By Mr. Strachan): Is this a correct statement of the computation which you made for the purpose of showing the profit or loss which Winck-

(Testimony of Robert Hodge.)

ler & Smith would have received or realized on the processing of 12,000 tons——

The Court: Then you will have to read the whole testimony on that subject.

Mr. Strachan: It is down to there (indicating), a little less than a page.

The Court: Is that all the testimony that he made on his computations?

Mr. Strachan: On that item.

The Court: That is the final result, [2104] counsel.

Mr. Strachan: It is not the final result.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Strachan: This is processing profit.

The Court: On 12,000 tons?

Mr. Strachan: Yes.

The Court: I don't know that he gave a profit on 12,000 tons. He gave a profit of what would have happened if they would have had 12,000 tons added to what they already had, and the figure was—are you talking about the $25,000 figure?

Mr. Strachan: Here is what the witness said (indicating). I will show you the transcript, your Honor (handing document to the court).

The Court: The witness talked about a profit of $1.51 per ton, but in context he was talking about a differential, clearly. That is what it means, as I read it, over TreeSweet in producing.

If you want to frame your question in that way.

(Testimony of Robert Hodge.)

all right. But as your question is now framed it sounds as if it was the total computation that he was making.

Mr. Dixon: That is what I thought he was referring to.

The Court: If you want to you may ask that question, but if you do so you have to read all his testimony, you have to include the other things he testified to besides this one page. [2105]

Mr. Strachan: Rather than put my characterization or anybody's on it, may I not ask him if the testimony from there to there (indicating) is a correct statement of a part of his computation?

The Court: You may do that.

Mr. Strachan: Fine.

The Court: I am not trying to be technical, Mr. Strachan, but your question, which I had read by the reporter, you heard and the jury heard, sounded to me as if it was the end result that he finally testified to.

This matter concerns something in the middle. You may read it to him, you may ask him to explain it, anything.

Q. (By Mr. Strachan): Is the following a correct statement of a part of your computation:

"My computation was arrived at in this way. TreeSweet was paid $35.27 per ton for processing. Winckler & Smith's processing cost for the 1949 season, which I have used because that was the true Valencia season—1950 had many other products in it and was not a true Valencia season, so I used the

(Testimony of Robert Hodge.)

1949 processing cost—their costs total $34.06 a ton. That was made up as follows:

"Ingredients, $2.14; cans, $15.17; cartons, $2.01; labels, $1.17; drums, 25 cents; sacks, 38 cents; plant expenses, $11.10. [2106]

"The inventory increased during this period to the extent of $1.23 a ton, so I subtract that from all these costs.

"To these costs I also add general administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton.

"Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 a ton or a total of $18,120 profit on processing."

Is that a correct statement of that part of your computation?

A. That is a correct statement of part of my computation.

Q. Then the effect of that is, with respect to general and administrative expense, that you multiplied——

The Court: Are you reading or asking a question?

Mr. Strachan: I am asking a question.

The Court: I thought you were reading, counsel. You are holding the paper in front of you.

Mr. Strachan: I said "the effect of that"——

The Court: All right.

Q. (By Mr. Strachan): The effect of that is, then, that in your computation you multiply by

(Testimony of Robert Hodge.)

12,000 tons a cost which included $3.07 a ton as the element of administrative expense?

A. No, sir, that is not correct.

I am attempting to arrive at the difference in the processing cost as allowed under the TreeSweet contract with [2107] what Winckler & Smith's normal operating cost on a comparable basis would have been, had they had 12,000 tons of fruit additional to process.

Q. Mr. Hodge, could you make a computation showing the gross sales from the 12,000 tons of fruit of $750,000, which you testified to, show the costs of those particular sales, show the gross profit on the sales, deduct the selling expense on those sales, and the brokerage, deducting also general administrative expense, and show the net profit—profit or loss—on the processing of that 12,000 tons at that selling price, and also show us a reconciliation between that sort of an income account and your conclusion that with the 12,000 additional tons of fruit available Winckler & Smith would have converted $184,000 loss for the year ended 1952 into a net profit of $25,000, can that be done?

A. Yes, I don't see why that couldn't be done. It would take considerable time. But the end result would be the same. It is just a different form of stating it.

Mr. Strachan: I think in order to enlighten the jury, and counsel, and the court, that there should be such a computation, your Honor.

The Court: You can have one made. The witness

(Testimony of Robert Hodge.)

has said there are alternate methods of computing, and he has used one method. He said this could be made with considerable time. [2108]

I don't want to require him to do it.

Mr. Strachan: I suppose it would be within my rights to ask him to do it on the witness stand. I thought if he would do it at his leisure and bring in an exhibit it would save time in court.

Mr. Dixon: If the court please, I think that statement is not required practice. This witness is here for cross-examination as to the basis of his opinion on the basis of his testimony, and we will stay on this question as long as counsel wants to inquire on it; but it doesn't seem to me that in view of this witness' testimony, that any other number of methods might be taken, that this witness should be even requested to make such a computation.

The Court: The objection is sustained to that part.

Mr. Strachan: I would like to make an offer of proof on it.

The Court: You may make one.

Supposing there were 20 methods to compute this, do you think that the court would be required to make the witness compute the 20 different ways?

Mr. Strachan: I hadn't supposed that there were 20 different ways in which an accountant could make a computation and come out with 20 different answers and all of them be correct.

The Court: I don't know. [2110]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury is absent.

Proceed.

Mr. Strachan: Your Honor, there were two matters as to which I said I would offer proof yesterday.

One was with respect to the forgiveness of the 38,000 indebtedness to Winckler. I would have shown by the witness, had I concluded that line of cross-examination, that the forgiveness of the indebtedness recorded in the year ended January 31, 1950, operated as an increase of capital deficit and reduction of net worth. The other matter was——

The Court: Well, let's pass on that. That is what you now offer to prove?

Mr. Strachan: Yes, sir.

The Court: I think you have cross-examined, and I permitted you to cover practically all of that. It sounds to me much like repetition. The facts were all brought out and the records showed there were the two sets of minutes, one of which was identified by an exhibit number and the other, as I recall, was not, one in January and one in June. The witness said he closed the books after the June meeting, picked up the information from the preliminary minutes, and that he put [2111] it in that year for that reason. Obviously if he had put it in the succeeding year, based on the June meeting, it would have been in the other year. I think you have got

everything in the record.

The offer of proof is denied.

Mr. Strachan: Another one was with regard to the item of 19 some thousand dollars that was deferred from one year into the next. I would have shown, if I had proceeded with the cross-examination of the subject, the result of that was that the $19,000 item was deducted as a business expense for income tax purposes in each of two years. I think that would have borne on the credibility of the witness, and would also have borne on the question of whether the books and records were in fact kept in the usual and ordinary course of business.

The Court: The witness testified that from income tax purposes you have different problems than from bookkeeping purposes, and the questions to which I sustained objection related to what was done in the income tax returns and had no particular bearing on the issues of this case.

Your offer of proof is rejected. [2112]

Mr. Strachan: The other matter that I thought we should mention is the question whether you want the jury to have a view of a citrus processing plant.

I am sure it can be arranged.

It would be a matter of selecting the plant, time and place, and under what conditions.

The Court: I thought about it and my present inclination is no. There is no issue in this case about how you make orange juice. We are not concerned with how orange juice—we are not concerned, essentially, except that orange juice is made out of oranges.

Then you have the problem of plants. Going to the defendant's plant is one thing, going to some other plant might or might not be comparable to any of the plants in question. I don't think it adds anything.

I am inclined to tell the jury that their request is politely rejected.

Do you ask for this, or do you just raise the matter for discussion, Mr. Strachan?

Mr. Strachan: I think the jury, if they desire, should be allowed to see how a plant operates, how the fruits are processed for use as fruit, and how the remainder is shipped to the plant and processed, and inspection of the processing, the testing, the canning. And I should think, too, that it would be well to have the jury see the Winckler & Smith plant [2113] in Anaheim. So I would suggest that the jury's request be granted, and would suggest also that the jury be permitted a view of the Winckler & Smith plant.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: Our view, your Honor, is definitely to the contrary, for the reason, No. 1, that with reference to viewing any plant for processing oranges into orange juice, I don't see how, even assuming that that was possible, and that it would be possible at this time of year to see such processing operations insofar as Valencia juice is concerned, that it would in any way aid the jury in deciding any of the issues in this lawsuit.

This isn't a patent case or a case involving ques-

tions of whether particular processing operations are lawful or unlawful.

Second, with reference to viewing the Winckler & Smith plant, I discussed this matter with the trustee, and he informs me that the plant having not been operated for a period of two or three years, and some of the machinery and so forth having been removed therefrom, windows broken, after the property changed hands, it sems to me that the impression that the jury might get from viewing the Winckler & Smith plant at this time might in a sense certainly be prejudicial to the plaintiff, rather than be of any assistance to the jury in determining the value of the plant. [2114]

And that is the only purpose for which I could possibly see any relevancy to any of the issues in this lawsuit.

For that reason I would oppose any visitation of the Winckler & Smith plant.

The Court: All right.

I think the question is addressed to the discretion of the court. I think both grounds of objection as stated by Mr. Dixon are good, and I am going to inform the jury that we will not visit any plant.

Now is there anything further?

Mr. Strachan: I might just mention, your Honor, that I have cleared with Mr. Dixon the stipulation with respect to the explanation to be made of these various exhibits, so that is behind us. [2115]

* * *

Mr. Dixon: The explanations of Exhibits 4, 9, 10, 11, 12, 13, 14, 23, 24, 29, 32, and 33.

We have agreed on the form of the explanation, your Honor, subject to the approval of the court, and if your Honor approves I will arrange to have it prepared in precisely this form and an exhibit number attached to it, with of course the explanation by your Honor to the jury that it is submitted as an exhibit solely for the purposes set forth.

Mr. Strachan: I wonder if that should be done or whether it wouldn't be well to have the text taken off and attached to each exhibit, so as the exhibit is examined the explanatory material will appear right on the exhibit.

Mr. Dixon: That is perhaps even better yet.

The Court: I think that is a good suggestion, Mr. Strachan; whichever way you want to do it will be satisfactory. [2116]

* * *

ROBERT HODGE

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows: [2120]

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, at whose request did you prepare the computation which you testified to with respect to the TreeSweet contract?

A. You refer to Exhibit 67?

(Testimony of Robert Hodge.)

The Court: Yes.

The Witness: I prepared that at the request of Mr. Dixon and Mr. Irwin.

Q. (By Mr. Strachan): Did Mr. Dixon or Mr. Irwin ask you to prepare a comparable computation from the Silzle agreement?

A. Yes, they did, which is Exhibit 66.

Q. Did they ask you to prepare a computation of profit or loss from the Silzle agreement similar to the one you have testified to with respect to the TreeSweet agreement? A. They did.

Q. Did you make that computation?

A. I did not.

Q. Don't you know, as a matter of fact, that if you had used the Silzle contract instead of the TreeSweet Contract and made a computation from that with respect to processing by Winckler & Smith of 12,000 additional tons of Valencias, that would have showed that there would have been a loss from that operation which would have increased the total loss for the [2121] year? A. I did not.

Q. Do you know whether that would be the result? A. I do not.

Q. You never made the computation?

A. It certainly would not have increased the loss under any conditions, counsel.

Q. But you didn't prepare the computation?

A. No, but it is very evident.

Q. I think you said that your computations assumed that the selling price of the canned juice from this 12,000 tons of Valencias that you assumed

(Testimony of Robert Hodge.)

for the purpose of the computation would be roughly $750,000. A. I think that is correct.

Q. Now, if the fruit had been acquired under the terms of the TreeSweet contract, the canned juice would have been bought by Winckler & Smith for the same price, $750,000, is that correct?

A. Whatever the sales price as computed would have been, it would have been bought at that price, that's right. It may or may not have been [2122] $750,000.

Q. It would have been the same as the selling price in any event? A. That's right.

Q. Assuming that the $750,000 purchase price for the purpose of this computation is the price, the cost of the juice in the cans would have been computed as follows, would it not—subtract from the $750,000 the processing allowance as the first item, can you tell us what that would amount to on 12,000 tons?

Mr. Dixon: Are you speaking of the TreeSweet contract?

Mr. Strachan: TreeSweet, yes.

The Witness: Well, in my computation I estimated that it would cost Winckler & Smith, based on their costs in 1949, some $34.06 a ton to process.

Q. (By Mr. Strachan): But that is not what would have been allowed under the TreeSweet contract, is it?

A. No, sir. They would have been allowed $35.57 under the TreeSweet contract.

(Testimony of Robert Hodge.)

Q. All right. That would have been, say, $426,840, would it not?

A. I do not know, counsel. I am not that good at arithmetic.

Do you wish me to make the computation?

Q. Yes, I would like to have you do it.

A. Will you repeat your amount, sir? [2123]

Q. $426,840.

A. Maybe you had better repeat your question. I evidently misunderstood you.

Q. What would be the amount allowed for processing 12,000 tons of fruit under the TreeSweet processing agreement? A. $426,840.

Q. Now, there would have been a label allowance, would there not, of $1.59?

A. There would have been.

Q. On 12,000 tons? A. Yes.

Q. What would that have amounted to?

A. On 12,000 tons it would have amounted to $19,080.

Q. There would have been an advertising allowance of what—$1.83, is it? A. $1.88.

Q. On 12,000 tons, what would that aggregate?

A. That would have aggregated $22,560.

Q. Then there would have been a 15 per cent brokerage allowance or $9.41 per ton?

Mr. Dixon: Counsel, that is not a brokerage allowance, if I may rise to correct you. It is a discount.

Mr. Strachan: Pardon me. Discount allowance.

(Testimony of Robert Hodge.)

(The question as corrected was read by the reporter as follows: [2124] "Then there would have a 15 per cent discount allowance, or $9.41 per ton?")

The Wtness: There would have been.

Q. (By Mr. Strachan): For 12,000 tons?

A. For 12,000 tons.

Q. What would that have amounted to?

A. That would have amounted to $112,920.

Q. If you add together the processing allowance, label allowance, advertising allowance, 15 per cent discount allowance, what would the total of those amount to?

A. Evidently counsel is not an accountant. You wouldn't add such things together, because they are different. One is a credit——

Q. Aren't those the amounts which are under the TreeSweet contract deducted from the purchase price of $750,000? A. No, sir.

Q. Well, isn't the cost of the fruit, isn't the cost of the $750,000 merchandise arrived at by charging the processor the $750,000 and then granting credits against that for processing allowance, among other things?

A. Why would you charge the processor $750,000, sir?

Q. I thought you said that the selling price of $750,000 was also the price of the finished product which the processor would be charged by Sunkist.

(Testimony of Robert Hodge.)

A. No, sir, that is not what I said. [2125]

Q. I thought that was the first proposition we set.

A. No. The $750,000 would be the amount that TreeSweet would sell it to its customers for. Not what the processor would be charged.

Q. Wasn't TreeSweet bound under its contract to purchase the processed goods at the Sunkist price? A. Yes, sir.

Q. And didn't you assume that the Sunkist price would also be the selling price by TreeSweet?

A. What do you mean by the Sunkist price?

Q. You answered a question once with——

The Court: Wait just a minute now.

If this $750,000 is what TreeSweet would sell to its customers for, TreeSweet was buying the cans from Sunkist at that figure, less 15 per cent, weren't they?

The Witness: Less label allowances, less other allowances, Judge.

Q. (By Mr. Strachan): So the $750,000 is the purchase price after the label allowance, the advertising allowance, and the discount allowance, and the processing allowance?

A. No. It is before it.

The Court: Tell us just how you would figure it out.

Would you start with the $750,000?

The Witness: Well, if you ask me to do this, I would start with the sales price of $750,000. Assuming that [2126] there is no element of profit in the

(Testimony of Robert Hodge.)

processing charges that TreeSweet recovered under the contract. So you would have $426,840. From that you would take the label allowances and the advertising allowances, at least in arriving at your cost of sales.

Q. (By Mr. Strachan): Deduct that from what, Mr. Hodge?

A. This is a rough attempt to reconstruct a profit and loss account now.

You have me on the stand, and I do not have time to think this out, and this is very rough.

On that basis the cost of sales of the $750,000 sale would have been $385,200.

Q. How did you arrive at that?

A. I took the label allowance and the advertising allowance—which I shouldn't have done, pardon me.

As I said before, you don't give me time to think this all out.

The cost of sales, restated, should have been $407,760.

Q. Will you tell us how you arrived at that?

A. Yes, sir. I took the processing charge, which was paid TreeSweet, of $35.57 a ton, multiplied that by 12,000, which gave me a figure of $426,840. Included in that figure is the label cost, which was allowed TreeSweet under the contract. So, therefore, it is already in there, they got that back from Sunkist, so we would reduce our cost of sales [2127] by that item, which gives me a net cost of sales of $407,760.

(Testimony of Robert Hodge.)

Do you wish me to follow further on my reconstructed profit and loss?

Q. Yes, tell us how you arrived at that.

A. Under the contract TreeSweet received $35.57 a ton for processing. Assuming no profit in that figure whatsoever, TreeSweet's cost would have been $426,840. But in that cost is a label cost, which they allowed under the contract. They were allowed $1.59 a ton under the contract. So, therefore, it was no cost to them, because they were paid back that cost. So I would reduce the $426,000 figure by this label allowance. [2128]

The Court: Which is 19,000.

The Witness: Which is $19,080.

Q. (By Mr. Strachan): Now, in your direct testimony, Mr. Hodge, as I remember it, you showed, according to your computation, that the Winckler-Smith actual costs, according to your assumptions, amounted to $1.51 less than the processing allowance.

A. That is right, sir, You asked me for something else, though in this computation.

Q. All right. But in your processing costs you did not deal with the label allowance because you added an item for label allowance to that $1.51?

A. That's right, sir. I put the Winckler & Smith computed costs for labels into my figure the same as you did in multiplying this out on TreeSweet's processing allowance.

Q. Do you understand, then, that in computing the price to be paid in cash to Sunkist, you do not deduct from the $750,000 in this case, you don't

(Testimony of Robert Hodge.)

deduct and give credit for 19,000 on account of the label allowance?

A. You do deduct it, sir.

Q. Deduct it from the 750,000?

A. That would be true, sir. They were allowed $1.59 per ton under their contract for a label allowance.

Q. Now, was that in addition to the allowance for processing? [2129]

A. That is in addition to the allowance for processing.

Q. All right. Now, let's subtract 426,840 of processing allowance from the $750,000.

A. If you will reduce that by $19,080, I will go along with your computation.

Q. I thought you told me that the 750,000 was the base price at which Winckler & Smith would have sold and which it would have paid Sunkist.

A. That is true, sir.

Q. Well, now, will you just go through this computation with me and then if you think there is an explanation for any difference that occurs, I would like to have you tell me what it is.

A. I would be very happy, sir. Could I have a copy of your computation?

Q. What's that?

A. Could I have a copy of the computation?

Q. You have it practically now.

The Court: Do you have a computation there?

Mr. Strachan: Well, I have it just in my notes here.

(Testimony of Robert Hodge.)

The Court: Can you lay it on the desk and then you stand up here and the two of you look at it? I would like to see it, too.

The Witness: Accountants are trained to see things. They are not trained to hear things, as attorneys are. I must [2130] see things before I can understand them.

Q. (By Mr. Strachan): We start up here with an item of 750,000 as being the base price at which the finished product is to be bought by the processor and presumably the price at which the processor will sell. A. That is true.

Q. Now, against that the processor is entitled to credit for his processing costs in the amount of $35.57 per ton, or a total of $426,840.

A. That is true.

Q. In addition to that, the processor is allowed as a label allowance $1.59 per ton, is that correct?

A. That is true, sir.

Q. Coming to a total of $19,080.

A. That is true, sir.

Q. In addition, the processor is entitled to an advertising allowance of $1.88 per ton, times 12,000 tons is $22,560? A. That is true, sir.

Q. In addition to that, the processor is entitled to a 15 per cent discount, amounting to $9.41 per ton, times 12,000 tons is $112,920.

A. That is right, sir.

Q. Now, the aggregate of those items of allowance on the 12,000 tons would be $581,400. [2131]

A. Yes, sir.

(Testimony of Robert Hodge.)

Q. What is that figure, the total allowance is what? A. $581,400, sir.

Q. Subtracting those total allowances from the base price of 750,000, what is the difference?

A. The difference is $168,600.

Q. That would be the amount of return for the juice component after the allowances, wouldn't it? You might call that the fruit cost in the finished product?

A. No, sir. That is an entirely erroneous statement. That would be the total amount the processor would be allowed under the contract, but your statement——

Q. No, that is the difference in——

A. You are merely making a mathematical computation here. You are adding apples and pears.

Q. This is arithmetic. A. That's right.

Q. The difference between the 750,000 and the allowances is $168,600, is that correct?

A. That is the mathematical difference between the two.

Q. That is correct. Now, if you add together the processing costs, this is costs now, not allowance.

A. Yes.

Q. As you computed for Winckler. [2132]

A. Right.

Q. And the amount he would have paid, being the difference between his allowances and the price of the juice, namely, $168,000, gives you a total of $577,320, is that correct?

(Testimony of Robert Hodge.)

A. No, sir. That is a mathematical addition, but it is certainly not a correct statement.

Q. That is the statement of the processing costs as you computed it for Winckler.

A. That's right.

Q. And the difference between the 750,000 and the allowances.

A. Well, you can make such a computation, but——

Q. There is nothing wrong with that arithmetic, is there?

Mr. Dixon: Let the witness answer the question, please.

The Witness: I am sorry.

The Court: Go ahead.

The Witness: Subtracting the one from the other —no. You have added one to the other and got a figure, that is true.

The Court: Is it your position it is not correct?

The Witness: It is certainly poor accounting and certainly I would hate to operate under any such basis of accounting on a settlement of a contract.

Q. (By Mr. Strachan): If you take that $577,320 from [2133] the $750,000 selling price, that leaves a balance of $172,680, is that correct?

A. That is true. The mathematics, I assume, are correct. $172,680, that's right, sir.

Q. Now, if you take away from that 172,000 selling expense of 87,652, additional brokerage of 22,500, and the general administrative adjustment

(Testimony of Robert Hodge.)

you mentioned of $37,296.11, you would aggregate those three items at $147,488.55, is that correct?

A. That is the mathematical addition of those three sums, you are right, sir.

Q. Now, if you subtract that aggregate of 147,500, roughly, of combined selling and administrative expenses from the $172,680, you get a result of $25,231.45, is that correct?

A. Yes, sir. That is a correct mathematical computation.

Q. That is the same figure, is it not, that you said in your direct examination would have been the net profit to Winckler-Smith for the year ended January 31, 1952, had they processed 12,000 tons of Valencia oranges on the same terms as the Tree-Sweet contract? A. That is true, sir.

Q. Now, as a part of your computation, you said you used $35.57 per ton as the processing allowance that would be [2134] paid to the processor. Do you recall that?

A. Paid to TreeSweet in accordance with the terms of their contract.

Q. Yes. A. Yes, sir, I said that. [2135]

Q. Now, you arrived at that, did you not, by dividing the total amount that was paid or credited to TreeSweet by the total number of tons processed by TreeSweet?

A. I divided the amount paid—I shouldn't use the word "paid" because these were bookkeeping entries—the amount allowed by EOP to TreeSweet for processing by the number of tons processed.

(Testimony of Robert Hodge.)

Q. You did not take into account the fact that TreeSweet processed various sizes?

A. No, sir. I reduced everything for the sake of simplicity to appear on a tonnage basis.

Q. Well, isn't it a fact that the price per ton of allowance would vary under the contract in accordance with the size of can and the number of cans in a carton, if you know?

A. I do not know, sir. I just took the total paid by the total number of tons processed.

Q. Did you know when you made that average per ton that the allowance for processing 12/46 ounce cases was $31.63 per ton, whereas the allowance for cases of 48/6 ounce was $61.77 per ton?

A. Counsel, the prices fluctuated so, as I recall, from my examination of the contract the overhead varied with the rates of production. There were many, many factors that entered into our various allowances. [2136]

Q. Well, it is a fact, isn't it, that the processing allowance for 12/46's was $31.63, because that is a small number of large cans in a case, whereas the 48/6 ounce cases, the allowance would be nearly $62. because there are more cans in smaller packages?

A. May I state that I disregarded sizes. I simply took the total paid for processing, divided by the number of tons, to get an average price per ton. No regard was made as to sizes or any quantities processed under the agreement, as to their various sizes, or anything else. We simply arrived at a price per ton.

(Testimony of Robert Hodge.)

Q. These are allowances per ton that you were figuring, is that corect?

A. This is an allowance—we are talking about the allowance paid to TreeSweet by EOP for processing so many thousand tons of fruit.

Q. Are you able to tell us as you sit there now what portion of the composite figure of $35.57 was represented by 12/46's as distinguished from 48/6-ounce cases?

A. No, sir, I did not make any computations like that.

The Court: I don't know where we are getting, but if you had had the number of cans of various sizes and the allowances allowed, and actually processed by TreeSweet, when you added them all up would you have gotten the same result? [2137]

The Witness: I would have gotten the same average per ton, yes, sir.

Q. (By Mr. Strachan): I think you said for the purpose of obtaining Winckler's cost you used as your base year 1949? A. That is right, sir.

Q. Did you in making that analysis determine whether your per ton cost of the Winckler & Smith plant was based upon the same proportion of large and small cans, as was the production of TreeSweet under its contract?

A. No, sir. I simply took the total expenditures for each of the items and divided by the number of tons processed in that year.

The Court: By '49 you meant the canning year '49?

(Testimony of Robert Hodge.)

Mr. Strachan: Yes, sir, the canning year.

The Court: The fiscal year ending January, '50?

Q. (By Mr. Strachan): I think that is correct, isn't it, Mr. Hodge? A. That is right, sir.

Q. You made no adjustments in the various items of cost which you took from Winckler's books to reflect any increase in the costs of ingredients, materials, or any other of the items as between the year ended January 31, 1950, and the year ended January 31, 1952?

A. No, sir, there was no attempt made to determine any increased costs during that period in this computation. [2138]

Q. Don't you know as a matter of fact there was a general increase in the price level which affected the cost of various items that entered into your computation, as between those two years?

Mr. Dixon: Price level of what?

Mr. Strachan: General price level.

Mr. Dixon: I object to that question. I think it has to be applied to this industry, your Honor.

The Court: Sustained.

Price increases in what, counsel?

Q. (By Mr. Strachan): Did you know that Mr. Browne of the Union Appraisal Company testified that in part his writeup was based upon the fact that there was a general increase in the price level of approximately 8 per cent between the two years?

Mr. Dixon: I object to that question, your Honor, on the ground that it has no relevancy to

(Testimony of Robert Hodge.)

the testimony of this witness, unless it is confined and directed to something that goes into the product.

The Court: Sustained.

Counsel, I have indicated you may inquire as to increase in prices on particular commodities that go into orange juice, if there are other things besides orange juice. But the question about machinery and equipment that Mr. Browne was talking about doesn't interest us here. [2139]

Q. (By Mr. Strachan): Did you know when you made your computation that between the year ended January 31, 1950, and the year ended January 31, 1951, the cost of cans increased?

A. I did not take any increase, such as that, into my computations, no, sir.

The Court: Well, the question was did you know whether or not cans increased?

The Witness: I did not know.

Q. (By Mr. Strachan): Did you know that the cost—that the increase in the can cost between the two years amounted to $1.13 per ton?

A. I did not, no, sir.

The Court: Per ton of oranges or cans?

Mr. Strachan: Per ton of oranges.

The Court: Is your answer still the same?

The Witness: I wouldn't have the slightest idea how counsel arrived at that figure, sir.

Q. (By Mr. Strachan): Did you know as you made your computations that there had been an increase in the cost of cartons between those two years?

(Testimony of Robert Hodge.)

A. I made no reference to such increase, sir.

Q. You made no references to any possible increase in costs between the two years?

Mr. Dixon: If the court please, I think this witness has testified that it is based upon the year 1949. I presume [2140] the examination was proper, but——

The Court: Overruled. Answer the last question.

The Witness: I did not give any weight to any such increase, sir.

Q. (By Mr. Strachan): I think you said that Winckler & Smith maintained a record of what you called standard costs?

A. They did at some time during their operations, they maintained what we would call standard costs.

Q. Did you in connection with your computations, or at any other time, for the purpose of testifying in this case, refer to Winckler & Smith's cost records? A. Yes, sir, I did.

Q. For the year ended January 31, 1952?

A. I did, sir.

Q. The costs which you used in your computation were not those that appeared in the Winckler & Smith cost accounts for the year ended January 31, 1952, were they?

Mr. Dixon: If the court please, I think that obviously can have no application to the testimony of this witness. There was no Valencia juice pro-

(Testimony of Robert Hodge.)

duced in '52 upon which he could possibly base such an estimate, by this company.

The Court: Answer the question. Let's get ahead.

The Witness: May I have the question again, please, sir?

(Question read by the reporter.)

The Witness: Counsel, I told you at least three or four [2141] times now that my computation was based on the actual per tonnage cost of Winckler & Smith during the packing season of 1949, or the fiscal year ended January 31, 1950. I gave no weight to any other factor.

Q. (By Mr. Strachan): Mr. Hodge, in your direct examination you testified that with this 12,000 tons of Valencia oranges processed under the terms of the TreeSweet arrangement, Winckler & Smith would have enjoyed a net profit for the year ended January 31, 1952, of $25,231.45?

A. I think they would have enjoyed it, yes, sir.

Q. They would have realized it was your testimony, was it not? A. Yes, sir.

Q. That profit, as I understand your testimony, would be after offsetting the actual loss for that year of $184,523.20?

A. That is true, sir. It would have made a net difference in their operations for the year of some $209,000.

Q. Nearer $210,000, isn't it?

A. I won't quibble with you over a thousand dollars, sir. It is not my thousand dollars.

(Testimony of Robert Hodge.)

Q. It would have made that difference after having met processing costs of $408,720?

A. That is not the figure I had. I had net processing cost of $407,760, sir.

Q. All right. I won't quibble over a few hundred dollars.

A. Good. Maybe we can get through yet. [2142]

Q. And that would have been also after having returned to Sunkist for the fruit, after allowances, approximately $170,000?

A. Pardon me, but how did you arrive at the $170,000?

Q. Well, that was after taking the $750,000, taking credit for the $426,000 processing, 19,000 label, $22,500 of advertising, 15 per cent for discount.

A. May I see the computation again, sir?

Q. Surely. A. I have forgotten.

Well, I don't agree with your methods here, counsel, your methods of computation at all. I can't see, possibly, how you add apples and pears and come up with a composite figure.

Q. I did not.

A. You are asking me to arrive at a net figure which is contrary to good accounting.

Q. We went through this on the arithmetic.

A. Then perhaps I misunderstood the question.

Q. On the arithmetic where we deducted the processing allowance, the label allowance and advertising allowance, the 15 per cent discount allow-

(Testimony of Robert Hodge.)

ance from the 750,000, and that left 170,000 as the balancing item, didn't it?

The Court: The witness told you he agreed with your arithmetic. [2143]

Mr. Strachan: Yes.

The Court: Now you are going over the same thing you went over before.

Mr. Strachan: That's right.

The Court: Then let's not do it. It has been gone over once. That is it. Ask another question.

Q. (By Mr. Strachan): Now, if we add that 170,000, then add the selling expense of 87,000, the additional brokerage, 22,500, and the administrative and general expense you used, $37,296, that would mean that the combination of all of those items would be approximately $900,000.

A. I am sorry. You are adding 170,000, 87,000, 22,000 and 37,000, and coming up with a total of 900,000, sir.

Q. No. I am adding those together with the 408,000 processing costs, and the $210,000, which is a combination of eliminating the $184,000 loss and converting that into a $25,000 profit.

A. Well, you are a little too fast on figures for me, sir. You will have to show me how you arrive at that figure. I can't follow it.

Q. Start out with a $25,000 profit figure, and we add to that the 185,000, roughly, of loss?

A. Yes, sir.

Q. That means that the difference which you attribute to the 12,000 tons in the year-end net would be virtually [2145] $210,000.

(Testimony of Robert Hodge.)

A. That would have made a difference in Winckler & Smith's operation of some $210,000, yes, sir.

Q. All right. Now, in order to make that difference, Winckler & Smith would have had to incur processing costs of, say, 408,000?

A. Yes, sir.

Q. We add to that what they would have returned to Sunkist in payment of the juice of around 170,000.

A. You mean to say the raw fruit would have only cost $170,000?

Q. No. It cost 750,000, and then you deduct these various allowances and come out with a balance of 170. Do you see what I mean?

A. $14.29 a ton. Yes, sir, I see what you are getting at.

Q. They would also incur, according to your computation, $87,652 of selling expenses?

A. That is true.

Q. They would also have had to meet additional brokerage, $22,500? A. That's right, sir.

Q. There is also another item you added in there of $37,296 for administrative and general expense?

A. That's right, sir. [2145]

Q. Now, that comes down to a total of $937,403.20 that would have to be realized in order to meet all of those items?

A. That is correct, sir.

Q. Now, in order to realize that $937,000, will you tell us what the selling price per case would be for cases of 12/46's?

(Testimony of Robert Hodge.)

A. They didn't have to realize that much, sir. I have previously testified I anticipated realizing $750,000.

Q. In order to eliminate that deficit and create a profit, they would have to obtain this $900,000, would they not?

A. No, sir. They were allowed a label allowance of $19,000. They were allowed advertising allowance of 22,000 odd dollars. They were also allowed 15 per cent discount, or some $112,000.

Q. And they were allowed 408,000 of processing allowance? A. That is true.

Q. You substract the sum of those from the 750,000 and you get the 170,000 that we have been talking about.

The Court: Well, let the witness finish now. We are back on this same subject again. Go ahead, Mr. Witness.

The Witness: Counsel stated we would have to realize $937,000 under his computation.

Well, I don't agree with him, because the [2146] largest amount that could have been realized from the sale of this fruit would have been approximately $750,000. So what he is trying to contend, I don't quite comprehend. It is impossible to realize more than the market price for the fruit under any conditions.

I will ask counsel, would $2.50 a case be a fair selling price during that year?

Q. (By Mr. Strachan): I am asking you if you will tell us what price per ton would have to be

(Testimony of Robert Hodge.)

realized on 12,000 tons in order to make up a total of $937,000.

A. Assuming we had to realize $937,000 from the sale of this 12,000 tons processed?

Q. That's right.

A. Well, just a minute. We will divide it out. $937,000?

Q. Yes, sir.

A. The mathematical computation is approximately $78.08.

Q. Can you reduce that now to the equivalent of 12/46 ounce cases? How much per case, 12/46 ounces?

The Court: Figure it out and then we are going to stop this.

The Witness: Approximately $3.40 a case, sir.

Mr. Strachan: That's all of the cross-examination.

The Court: I said we were going to stop this because if [2147] you are going to rely on this type of account, I want a written statement prepared on it so it can be analyzed. I am not much of an accountant, but I think somebody is treating you wrong in their computation.

Mr. Strachan: We expect our witnesses will put in a computation.

The Court: If you rely on it, I want a written computation prepared like the plaintiff prepared, and it can be handed to them for study like theirs was handed to you.

(Testimony of Robert Hodge.)

Mr. Strachan: Of course, the plaintiff's computation was not reduced to written form. However, we propose to have a written computation that can be examined.

The Court: Well, that is true. This other computation was made orally, but I think you should have a written computation on these matters.

Before we leave the subject, do you have any explanation of this apparent discrepanuy?

The Witness: Yes, sir, your Honor. There are some very flagrant discrepancies. In the first place, counsel adds allowances and costs. In other words, label allowances, advertising allowances and discount allowances were deductions from TreeSweet's costs. They were not additions. Why would you add them? I cannot understand acuounting like that.

In other words, if it cost you 400 and some thousand dollars to produce this fruit, you have got a credit of [2148] 19,000 for labels, so your cost would be reduced by that, and your advertising and sales expenses, as we have used them, of $87,000 would be reduced by an allowance from Sunkist of 22,000. That would not increase your costs. Those would reduced the cost.

Mr. Strachan: I think I can clarify that, if you want me to. I didn't use them to increase it. I used them to decrease. I had him aggregate all of them together and subtract them in a group. If he wants to go back and subtract them one at a time, it will come out at exactly the same position.

(Testimony of Robert Hodge.)

The Court: You say you are going to offer some proof on this?

Mr. Strachan: That's right.

The Court: By another witness?

Mr. Strachan: That's right.

The Court: We will take care of it at that time. Any redirect?

Well, we will have our recess now. Will there be redirect?

Mr. Dixon: Oh, maybe one or two questions, your Honor, is all.

The Court: All right.

Mr. Dixon: I might say we will be glad to prepare for the record and the use of the jury the computation which Mr. [2149] Hodge has used in arriving at the figures which he gave to the jury as the basis of his figures.

The Court: I think that is helpful to counsel, and I think it is helpful to the witness, the jury and the court. I know it is helpful to the court. Maybe some of the jurors are smarter than I am.

Mr. Strachan: I wonder if in that connection it might not be well to prepare a statement of the computation that I just went through orally.

The Court: Yes, you may do that. I think it would be helpful.

All right. Remember the admonition of the court. Leave the papers here. Take a short recess.

You may step down, Mr. Hodge.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

When that is done and these computations are prepared, I think it would make a lot more orderly procedure to terminate this cross-examination, reduce your two estimates to writing, and you will then, I take it, have expert witnesses to substantiate your calculations. If the plaintiff is not satisfied with it, they can call somebody back or they can cross-examine your experts. There will be no restrictions on you in recalling witnesses, except I hope on either [2150] side we don't have to keep going over and over the same thing.

Will that be all right to do it that way?

Mr. Strachan: I think so. That is a very practical way. [2151]

* * *

RONALD WALKER

a witness called on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ronald Walker.

Direct Examination

By Mr. Dixon:

Q. Will you state your residence address, Mr. Walker?

A. If I can remember it. I just moved.

20505 Covina Hills Road, Covina.

Q. You have been sitting here for some time, Mr. Walker; will you tell the jury what your connection is with Winckler & Smith?

A. Well, the jury has heard reference to a

(Testimony of Ronald Walker.)

Chapter X proceeding, which was filed I believe on the 19th of March in 1952. Upon the filing of that petition I was appointed [2152] trustee under this Chapter X of the Bankruptcy Act to take over the affairs and management of the corporation.

Q. And you qualified and have been acting as such trustee since your appointment up to and including the present time?

A. That is correct, yes.

Q. Mr. Walker, will you tell the jury whether as trustee you processed in the plant of Winckler & Smith any citrus juice products after your appointment as trustee?

A. Yes, we operated for approximately two years.

Q. Would you state to the jury what the extent of those operations were?

A. We processed many of the types of juices which have been referred to as best we could. The function of a trustee is somewhat multiple. One thing which it was necessary to do was to get—this is perhaps not completely responsive, Mr. Dixon—was to restrain the sale, which had been set by the RFC under their trust deed, getting extensions of time on the sale from time to time through court orders, and in the interim period to operate as best we could under the circumstances in which the company found itself, and to attempt financing, to examine into the affairs of the corporation, of its officers, and to attempt to formulate some plan of reorganization which might involve a dozen dif-

(Testimony of Ronald Walker.)

ferent factors, to enable the company to reorganize and recommence its business.

Your question related to production of [2153] juices?

Q. That is correct. In other words, to what extent, if any, did you process any citrus juices at the Winckler & Smith plant after you were appointed trustee thereof?

A. When I took over the affairs of the corporation, it was totally without cash, that is, completely unliquid, so that the processing which was done under my direction was of a rather limited scope.

To try to cover the area, we produced some material for the War Department, produced some orange concentrate hot pack for a Chicago concern. We produced quite a bit of stuff in conjunction with the E. A. Silzle Corporation, which was the neighbor immediately to the north of the Winckler plant, some of it on a joint venture program, some of it straight processing for them, for which we were paid a processing charge.

I made a contract with the Muscat Co-operative Winery people during the first year of operation to produce frozen concentrate grape juice similar to the small can which Welch's put out.

The whole action conducted under my auspices, if you call it that, was more or less in the nature of a delaying action. In other words, it was to try to keep the plant open, because it had considerably more value, we felt, as an operating plant than it would

(Testimony of Ronald Walker.)

have closed down, and to—well, simply to keep things going until we had exhausted [2154] every opportunity to obtain refinancing or to commence with a plan which would enable the company to continue business.

Q. Well, will you tell the jury, if you can, something about the efforts made by you as trustee to effect a reorganization and/or disposition by sale or otherwise of the assets of Winckler & Smith? [2155]

* * *

The Witness: Mr. Winckler has already testified as to his rather extensive efforts to obtain refinancing, to get fresh money into the corporation. He was automatically removed as an officer of the company at the time of my appointment.

The Court: You say removed. He was still an officer, but his authority——

The Witness: His authority was removed. I tried to utilize his efforts along the directions to which he has testified and co-operated with him whenever it was necessary in connection with attempting refinancing.

I personally tried to—that is, my efforts toward an ultimate sale of the property were directed more within the industry itself, and they were rather complex.

The Court: Well, you tried and you didn't succeed.

The Witness: Right.

The Court: All right.

(Testimony of Ronald Walker.)

Q. (By Mr. Dixon): Will you tell the jury what ultimately happened to the plant? The plant is still there?

A. The plant ultimately was sold under a voluntary liquidation. It was purchased by Allen Rubin. That is not Maxwell Rubin, but Allen Rubin, for the sum of $100, subject to all of the existing encumbrances.

Those encumbrances generally consisted of the balance on the RFC loan of $50,499, as I recall the figure, plus [2156] considerable accumulated interest; the second trust deed in the name of Albert Parvin for $57,500, plus several months of accumulated interest; some back taxes, state and county taxes—I have forgotten the exact amount. My recollection is it was either 7,500 or 10,500. There were withholding tax liens of the government for about $8,000.

As I recall, the total was somewhere in the neighborhood of $140,000 to $150,000.

In addition to that, the Anagold label, the rights to the Anagold label were sold to the Muscat Cooperative people, who had been using that name by arrangement with me on this grape juice. That was sold for $1,000.

Mr. Dixon: Thank you, Mr. Walker.

Your witness, counsel. [2157]

The Court: I think I should also ask, are you a member of the Bar of the State of California?

The Witness: Yes, your Honor.

(Testimony of Ronald Walker.)

The Court: And a member of the Bar of the Federal Court in this District?

The Witness: That is correct. [2158]

* * *

ROBERT HODGE

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Dixon:

Q. When you were excused yesterday, Mr. Hodge, we were [2166] discussing the manner in which you arrived at the approximately $210,000 figure as being the amount which would have been realized by Winckler & Smith on a contract or any other arrangement comparable to that between Tree-Sweet and Sunkist pursuant to which 12,000 tons of Valencia oranges would have been made available to Winckler & Smith. Have you prepared a short summary showing the manner and method of arriving at that figure? A. I have, sir.

Q. Directing your attention to Exhibit 69, I will ask you if that exhibit for identification is such summary? A. That is so, sir.

Q. Will you now state to the jury anything that you may desire to add to your testimony, which may help the jury in determining and clarifying the manner in which you arrive at the $209,754.65

(Testimony of Robert Hodge.)

figure at the bottom of Plaintiff's Exhibit 69 for identification?

A. It might be more readily understood if I stated that I base my computation of some $209,000 that Winckler & Smith would have realized under this so-called arrangement, that they would have been allowed these allowances, and they would have made this profit on their processing, and the advertising allowance, the discount, which totals $172,000; they would have gotten that under the contract. In addition to that they would have also absorbed some $56,417.38 of [2167] their general administrative overhead, which is included in my profit and loss statement for 1952. So the total realization under the contract would have been about $228,000, roughly. From that we will have to take the additional brokerage of some $22,000, which would have had to be paid to sell the merchandise, which would relieve them, roughly, of two hundred six or seven thousand dollars, just stated roughly, under the contract, that they would have realized under this contract.

Does that simplify it somewhat? [2168]

Q. Well, I think you made some mention yesterday, Mr. Hodge, on cross-examination about apples and pears. You didn't say anything about oranges and orange juice, though. Will you tell the jury what that reference related to?

A. Well, just a minute and I will see if I can find my pencil notes that I made at that time.

The defendant had some figures which were prepared—rather, which showed the following figures.

(Testimony of Robert Hodge.)

I understood we were to get a copy of these figures to be used this morning in court.

Q. Well, we will have them, so tell us to the best of your recollection.

The Court: Well, let's go on.

Q. (By Mr. Dixon): As I recall the examination by counsel for defendant, he referred to a figure of some 938 or some odd thousand dollars as being the amount which he computed would have been involved in performance of the contract or arrangement that you testified to with reference to the 12,000 tons of Valencia oranges referred to in Plaintiff's Exhibit 69.

Have you had an opportunity of considering those figures that were referred to yesterday by counsel in connection with that nine hundred and some odd thousand dollar figure?

A. I have, sir.

Q. That figure differs from the 750,000 figure which [2169] represents the selling price, does it not, to Winckler & Smith of the juice realized from the 12,000 tons of oranges, assuming they were made available to Winckler & Smith?

A. It differs materially, yes, sir.

Q. Can you explain to the jury what the difference is or how it was determined or what was wrong with your figures or with counsel's figures?

A. In my opinion the defendants' figures included the general administrative expense twice. The fallacy of his accounting, of his summation, is that those figures are in there twice. As I recall the

(Testimony of Robert Hodge.)

summary, the defendant started out with my estimated profit of some $25,000, to which he added a loss of 184,000. He also added 408,000 worth of processing costs, and $170,000 would have been paid for the raw fruit.

He again added selling expense of 87,000, the brokerage of 22,000, and the excess of general administrative expense over the amount that is in the 408,000 of some 37,000, which made up a grand total of $937,000.

The fallacy of that figure is that the selling and general administrative expenses of some $181,000, as shown by Exhibit 65 are in there twice. It is in the loss figure of $184.000. $56,000 of general administrative expense is in the $408,000 figure. The selling expense of $87,000 is clearly identifiable as such. [2170]

The excess of the G and A over what is in the processing cost of some $37,000 is also readily identifiable.

Taking those from the $937,000, you come back to approximately the $750,000 figure that I state would have to be realized from the—or would be realized from the sale of this juice.

Q. Directing your attention specifically now, Mr. Hodge, to 69, and the figure of $34.06 per ton, that figure multiplied by 12,000 tons, I believe, gives a figure of something like $408,000, does it not?

A. Yes, sir.

Q. In arriving at that $408,000 figure, will you state so that it will be clear to the jury what part

(Testimony of Robert Hodge.)

of the, roughly, if any, of the administrative overhead as shown on the Plaintiff's Exhibit 65, the operating statement for the fiscal year ending January 31, 1952, is included?

A. In that computation of $34.06, that includes the actual expenditures in the year ended January 31, 1950, of some $56,000, $56,417.38 is included in that computation, in that processing cost. In other words, that includes the absorption of that much expense in addition to the cost that would have been incurred in processing the fruit into cans, putting it into cans, cartons, and so forth.

Mr. Dixon: It might be helpful to the jury to better understand this if they had Plaintiff's Exhibit 65 before [2171] them, perhaps, your Honor, where they could see the items that are referred to in that exhibit.

The Court: You mean to understand what you are talking about now, or 69?

Mr. Dixon: To understand what this $56,417 figure is that he is talking about as being absorbed and recovered in the $34.06 figure. I think one of the jurors has a question.

The Court: Yes, sir.

Juror Berger: The computation on the $34.06 a ton, we have the letters G and A there. What does that refer to?

The Witness: General and administrative expenses. It is just an abbreviation used.

Q. (By Mr. Dixon): But that is the figure that is referred to or that covers the general administra-

(Testimony of Robert Hodge.)

tive expenses in the operating statement for the fiscal year ending January 31, 1951, is it not, Mr. Hodge? A. January 31, 1950, sir.

Q. 1952. I am sorry.

A. Now you have me confused. The $56,000 that is absorbed in the processing cost was the actual general administrative figure for the year ending January 31, 1950, and was used that way because all of my costs were computed on the basis of production of that year.

Q. You are right, I am sorry.

The Court: Now, I am no CPA, but I need explanation to [2172] understand 69.

Mr. Dixon: Proceed, your Honor. I think, however, it might be of help to the jury to have this operating statement for that period.

The Court: All right. Pass 65 to the jury.

The Witness: Couldn't we also pass 61 at the same time?

Mr. Dixon: Yes. Whatever you think is necessary to make it clear to the jury, Mr. Hodge.

The Court: 61 and 65. 61 is the statement of income account for the year ending January 31, 1950. That would be the canning season of 1949, which was the Valencia season you took?

The Witness: That is correct, Judge. [2173]

The Court: And 65 is the income account ending for the year January 31, '52, which involves the 11 months of the year 1951, and one month of the year '52, that is the year in question in which you

(Testimony of Robert Hodge.)

are supposing that in addition to what business Winckler & Smith did in that year they also had 12,000 tons more of oranges available?

The Witness: That is correct, sir.

The Court: Let's see if I can understand this. On 69 you suppose that you are going to add 12,000 tons more to the work of Winckler & Smith for the year that ended January, '52, that would be the canning season of '51?

The Witness: That is right, Judge.

The Court: That is the year they only had $670,000 of sales, so you are going to add $750,000 more to sales, which would mean around $1,300,000, or somehting like that?

The Witness: That is true, Judge.

The Court: Which would be then comparable with the sales that they made in the year ending January 31, 1950, Exhibit 61, where there was $1,367,000 in sales?

The Witness: Yes.

The Court: Then you took that year, you say, because it was a Valencia canning year?

The Witness: That is true, Judge.

The Court: So the first thing you do is to list the TreeSweet processing cost from its contract, which meant that [2174] TreeSweet was paid $35.57 per ton for the processing it did?

The Witness: That is right, Judge.

The Court: Then you list that the Winckler & Smith processing cost on this basis of the '49 can-

(Testimony of Robert Hodge.)

ning season was $34.06 a ton. So you then say that Winckler & Smith would have made a profit of the difference between the two figures, $1.51 per ton for each ton it processed?

The Witness: Yes, sir.

The Court: Now, the $35 figure that TreeSweet was paid included, because it was a figure to cover TreeSweet's cost, included TreeSweet's selling, administrative expense, all those various items were included in that figure?

The Witness: I don't believe it included selling expenses, your Honor. I believe it included general administrative expense.

The Court: General administrative expense——

The Witness: Plus all of the costs incurred in actually processing the juice.

The Court: Actually processing?

The Witness: Yes, sir.

The Court: So by the same token the $34 figure, if you are going to make a comparison, would have to include the same thing?

The Witness: That is right, sir.

The Court: Therefore, since the $34 for Winckler & [2175] Smith was to include that, the financial statement of Winckler & Smith already has been charged with $56,000 for "G"—what is that?

The Witness: General and administrative expense?

The Witness: Yes.

The Court: So you merely make a note of that in passing?

(Testimony of Robert Hodge.)

The Witness: Yes..

The Court: To call our attention to the fact that your account has already been charged for that amount?

The Witness: That is right, sir.

The Court: Then you figure out these various items which total $172,000 of allowances, discount, advertising, and so forth—is that right?

The Witness: Yes, sir.

The Court: Then you go down here and you are going to take some things away, apparently, from the $172,000?

The Witness: Yes.

The Court: You are going to say Winckler & Smith would have had a selling expense of $87,000?

The Witness: That is right, sir. That is actual selling expense in that year.

The Court: That is the selling expense they had in the year ending January, 1952? [2176]

The Witness: Yes, sir.

The Court: And they had a brokerage of $22,000, brokerage expense on this additional canning?

The Witness: Yes, on the additional sales of this canning.

The Court: The next one you list, "Excess G. and A. in 1952," you give a $93,000 figure, which you took from Exhibit 65, which was the G. and A. expense actually shown on the books in 1952?

The Witness: Right, sir.

The Court: Over 1950. 1950, the year ending January 31st, the administrative expense was

(Testimony of Robert Hodge.)

$56,000, that was the bigger year, but it was a smaller expense?

The Witness: That is true.

The Court: So you said, therefore, that you would charge this account that you are setting up this excess?

The Witness: Yes, sir.

The Court: In other words, instead of saying administrative expense for the year—this suppositious year that ended January 31, '52, was only the same as this other year that you were comparing with, you took the difference and charged it on your suppositious account?

The Witness: That is right.

The Court: You took the difference because $56,000 was already included in the administrative expense, the G. and A., [2177] for which you had been paid the $34 a ton?

The Witness: That is right, sir.

The Court: So you didn't have to charge the fifty-six, but you charged the excess?

The Witness: That is right, sir.

The Court: That gave you a figure of $147,000?

The Witness: Yes, sir.

The Court: Now, what do you do? Deduct the $147,000 from the $172,000?

The Witness: Yes, sir.

The Court: Why do you do that?

The Witness: Because you would have had these allowances under the contract and you would have this additional expense.

(Testimony of Robert Hodge.)

The Court: That gave you $25,000?

The Witness: Yes, sir.

The Court: Then what are these next two lines?

The Witness: We would have had an operating profit of some $25,000 for the year ended January 31, 1952, instead of a loss as shown on Exhibit 65 of $184,528.20, as I have already deducted all of the expenses shown in Exhibit 65 in making this computation.

The Court: In other words, what you would have gained by the production of these oranges was $172,000. And then you have deducted—already there has been taken the expense [2178] of G. and A. in making them in the $34 a ton?

The Witness: That is right, sir.

The Court: So you merely added the additional amounts that should be charged, such as selling expense, as shown here, brokerage, and the excess in G. and A.?

The Witness: That is right, sir.

The Court: So that left you $25,000, and then since you would have come out with 25,000 on top, that meant that you would absorb the loss of one hundred eighty-four and were $209,000 ahead?

The Witness: That is right, sir.

The Court: What is the next item? Just a computation on 15,000 tons?

The Witness: That would have been the end result had we had 15,000 tons instead of 12,000 tons, computed in the same manner.

The Court: All right.

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): Just one more question. The $34.06 figure represents the juice in the cans with the labels; ready to go to the broker or to the consumer buyer, does it not?

A. Plus the absorption of $56,000 general and administration expenses.

Q. And this is based on the assumption that there would be no additional selling costs incurred other than the [2179] 3 per cent brokerage?

A. That is true, sir.

Q. Because the overhead of Winckler & Smith for the selling was already there, but not utilized to its full capacity? A. That is right.

Mr. Dixon: That is all, your Honor.

Recross-Examination

By Mr. Strachan:

Q. Mr. Hodge, I believe, if I understand Exhibit 69, that your figure of $25,231.45 is your computation of the profit which Winckler & Smith might have realized from the processing of 12,000 tons of oranges?

The Court: You answer that, Mr. Witness.

The Witness: No, sir. That is the profit that would have been realized by the corporation had they had an additional 12,000 tons for processing under the same terms and conditions as were under the TreeSweet contract.

The Court: Let's not have any misunderstand-

(Testimony of Robert Hodge.)

ing. Whether the witness is right or wrong, the question you asked is not what he has said. This is his computation by adding 12,000 tons to the production and operation already carried on in the year ending January, '52. Therefore, it is not a mere computation, according to the way I understand his [2180] testimony, of what you would have made by merely processing 12,000 tons. It is a combination of that, plus the other things that had transpired in the year ending January, '52. [2181]

Q. Well, the heading, the titling of the $25,000 item is, and I quote from Exhibit 69, "Winckler & Smith Estimated Profit from Processing 12,000 Tons of Valencia Product Oranges, $25,231.45."

That is the way it reads, isn't it?

Mr. Dixon: If the court please, if that is an error——

The Witness: It reads that way.

Mr. Dixon: ——then it should be corrected. This was gotten up in a hurry, but it is not intended to be an isolated operation.

The Court: The objection is overruled. That's the way it reads.

Q. (By Mr. Strachan): That is the way it reads? A. That is the way it reads.

Q. And the way you obtained that $25,000 figure was to deal with items of cost and items of selling price for 12,000 tons of Valencia oranges, isn't it?

A. No. The way that figure is obtained is by taking the amount that was estimated to be realized under this contract and subtracting therefrom the

(Testimony of Robert Hodge.)

actual expenses during the year ended January 31, 1952.

Mr. Strachan: I would like to have this document marked with copies for the jury.

The Court: Defendants' Exhibit AZ.

Mr. Strachan: Well, now, I don't think I gave you the [2182] right one.

The Court: We have the wrong one?

Mr. Strachan: Yes. I am sorry. These came in after the court convened.

The Witness: One of the jurors wants to say something.

The Court: All right.

Juror Johnstone: I would like to know how many tons Winckler & Smith did process for the year 1951.

The Witness: The year ending January 31, 1951?

Juror Johnstone: No, ending January, 1952.

The Court: The canning season of 1951?

Juror Johnstone: Yes.

The Court: Ending 1952.

Mr. Dixon: I think it is in the record somewhere.

The Court: Yes, I believe it is in the record.

Mr. Dixon: I am not sure just where it is. The total of all fruit, as I recall, was about 5,000 tons, which included grapefruit and lemons, such as they were.

The Court: Do you have the figure?

(Testimony of Robert Hodge.)

The Witness: Do you wish me to answer the question?

The Court: Yes.

The Witness: The year of 1952, I mean the canning season of 1951, was a very unusual year for Winckler & Smith, and Mr. Winckler made some desperation deals to keep the plant going. [2183]

The Court: Just give us the figures.

The Witness: The figures?

The Court: Yes.

The Witness: It was a little misleading and that is why I tried to explain it.

The Juror: I want to know what you added the 12,000 tons to.

The Court: What's that?

The Juror: I want to know what you added the 12,000 tons to, the mythical 12,000 extra tons.

The Witness: Winckler & Smith processed 5,000 tons, 5,010 tons of Valencias. They processed 64 tons of lemons and 2,276 tons of grapefruit. They also processed 744 tons of navels.

The Court: What do they total in tons all mixed together, adding apples and pears?

The Witness: All right, sir. The total of all of the various fruit processed in that year by Winckler & Smith was 8,095 tons.

The Court: We have in the record, also, the tonnage processed in the canning year of 1949. I am trying to turn to my notes here.

Mr. Dixon: I think, your Honor, the total of all

(Testimony of Robert Hodge.)

fruit in 1949 was around between eighteen and twenty thousand tons.

The Witness: Was it 18,377 tons? [2184]

The Court: In the 1949 canning season?

The Witness: 1949 canning season.

The Court: Which was the year ending January, 1950?

The Witness: Yes, sir. Of that amount 12,780 tons were Valencias, 14,051 tons were navels, 4,146 tons were grapefruit. [2185]

* * *

Q. (By Mr. Strachan): Now, referring to Exhibit AZ, I believe your testimony is that you allow for processing costs of 12,000 tons at $34.06 a total of $408,720? That is the figure we went over yesterday? A. Yes, that is correct.

Q. That was one of the costs of sales?

A. Yes, sir.

Q. Now, the cost of the finished product was this. You start out with the Sunkist selling price of $750,000, because that is what the processor was required to pay for the product? A. Yes, sir.

Q. Or account for? A. Yes, sir.

Q. Now, we get to what you call adding peaches, pears and apples, so I separated the peaches, pears and apples here so that we wouldn't add them.

A. We now have oranges, sir?

Q. From the 750,000, which would be the purchase price to the processor—— A. Yes, sir.

Q. ——we deduct the processing allowance provided for [2186] in the Tree-Sweet contract?

(Testimony of Robert Hodge.)

A. That's right, sir.

Q. And that was $426,840? A. Yes, sir.

Q. On 12,000 tons? A. Yes.

Q. Next we deducted a label allowance of $1.59 a ton, $19,080, we deduct that, leaving $304,080. I believe that is what you testified to?

A. Yes, sir.

Q. Then the advertising allowance on the 12,000 tons would give us another deduction of $22,560, leaving to be accounted for out of the 750,000, $281,520.

Then the processor was allowed a discount of 15 per cent. You applied that 15 per cent to the cost of 750,000 and came out with $112,920, that is, you converted the discount to a tonnage basis of $9.41 a ton, is that correct?

A. That is correct, sir.

Q. So that left a remainder of $168,600 to be paid by the processor to Sunkist to balance that $750,000 selling price?

A. That is correct, sir.

Q. Now, when you add the processing cost to the cost of the juice, the 168,600 that is not absorbed in the allowances, that leaves $577,320, which is the total cost of the [2187] processing and the juice in the cans?

A. Plus the cost of the raw fruit, represented by the $168,600 figure.

Q. That's right. So that makes the cost of selling the $750,000, the cost of sale, $577,320?

(Testimony of Robert Hodge.)

A. You wouldn't express it that way, counsel. It is not the cost of selling the product.

Q. The cost of sales?

A. The cost of sales, yes, sir.

Q. Cost of sales is the expression that you used in your regular income account?

A. That's right, sir.

Q. And this is cost of sale on the 12,000 as developed in your computation? A. Yes, sir.

Q. So deducting the cost of sales from the gross sales leaves a gross profit of $172,680?

A. That's right, sir.

Q. Now, that is the gross profit on the 12,000 tons, is it not?

A. That does not include the absorption of some $56,000 worth of overhead, general administration.

Q. All of these figures have been developed by multiplying a cost factor by 12,000 tons, is that correct? A. That is true, sir. [2188]

Q. All right. Now you have the product finished and in the cans. There are going to be some other costs involved in disposing of them, is that correct?

A. That is correct, sir.

Q. The selling expense which you allowed was $87,652.44?

A. These selling expenses did not apply to this particular 12,000 tons, no, sir.

Q. Did any part of that selling expense apply?

A. Not in my computation, sir.

Q. Did you assume for the purpose of your com-

(Testimony of Robert Hodge.)

putation that there would be no selling expense for disposing of 12,000 tons of product?

A. There would be very little selling expenses other than additional brokerage of some $22,000. The company had a staff of salesmen which it kept during that period. It would have had to incur no additional selling expenses other than the brokerage. Oh, there might have been a few telephone calls or items like that, but nothing substantial.

Q. You did, for the purpose of your computation, deduct $87,652, didn't you?

A. Not from the basis you are arriving at, sir, or the statement you just made. You are inferring that I said this $87,000 would be spent——

Q. Go back to Exhibit 69, if you will, please. Tell me whether on the face of that exhibit you don't show that [2189] $87,652.47 as Winckler & Smith's selling expense?

A. You asked me if that would be the selling expense on this particular 12,000 tons of oranges, and I say it would not be.

The Court: The difficulty, counsel, and let's not confuse the jury, is that 69 is a composite estimate. Now you are working out an estimate on tons.

Mr. Strachan: He worked it out on tons, your Honor.

The Court: The witness has conceded he estimated that the general items of selling expense of $87,000, which was shown in Exhibit 65 for the year ending January 31, 1952, would have been the same, whether Winckler sold the goods they did sell or

(Testimony of Robert Hodge.)

whether they also sold the additional 12,000 tons, with the exception of brokerage, and he made an allowance for additional brokerage.

Now, whether he is right or wrong, the 87,000 is treated differently in 69 than it is treated in AZ.

Mr. Strachan: I don't agree with that, your Honor. You look at Exhibit 69 and you will see that from the 172,000 that is shown on Exhibit 69, there are three items added together and deducted. They are $87,652.44 for the selling expenses, $22,500 for brokerage, and the other is the general and administrative. Now, if you will refer to AZ, you will find that instead of aggregating those three items and deducting them in a sum total, I have deducted them one at a [2190] time, but it is precisely what he has done arithmetically on Exhibit 69.

The Court: You are going to contend—let me get this straight—from AZ that the net profit for the 12,000 tons was only $25,000 and that, therefore, it should have been deducted or set off against the loss of 184,000?

Mr. Strachan: That is correct. [2191]

The Court: That is what you are going to contend?

Mr. Strachan: That is right.

The Court: On the witness' own statement, right or wrong, where he said he assumed the $87,000 of selling expense would include the sales of these new products, if that is true, that has already been taken into account in arriving at the $184,000 loss.

(Testimony of Robert Hodge.)

Accordingly, to start with, you would immediately have to take not only the $25,000 profit that you would concede from the $184,000 loss, but you would also have to take the $87,000 off, because you can't count it twice.

In other words, the $87,000 is shown as one of the figures on Exhibit 65, that expense is shown as one of the things that gave the $184,000 loss. If that is true, and the $184,000 loss is made up in part of $87,000 selling expense, if you are going to contend that you take the $87,000 off here, and then say that the net profit on this transaction is $25,000, you are taking it off twice.

I am no CPA, but that is apparent.

Mr. Strachan: I think on the face of Exhibit 69 it is apparent that he took that $87,000 off as selling expense.

The Court: Yes. But he takes it off there—I am not saying whether he is right or wrong, but I am trying to understand what he did—he takes it off there, because he is [2192] making a composite of what actually happened, plus adding 12,000 tons more. Accordingly, when he gets down, having taken it off, he says, "I am not going to take it off twice, since I took it off once, I am not going to count it in my $184,000 loss."

Mr. Strachan: I don't see where he has taken it off more than once here.

I have taken it off once and he has taken it off once, your Honor.

The Court: All I am saying is this: If you take

(Testimony of Robert Hodge.)

it off on Exhibit AZ, then your figure of 25,000 to that extent does not represent the composite operation of the year '51, on the supposed basis. Because it has already been taken off in the loss of 184,000, if you take it off again it is being taken off twice.

Mr. Strachan: All right. I will put the question to the witness now:

Q. If the $87,652 selling expense is included in the $184,000 loss, will you explain to us why, on Exhibit 69, you deducted it again as Winckler & Smith's selling expense?

A. Because I am trying to arrive at a figure which would have been the net profit for Winckler & Smith's operations for the year. I am not trying to arrive at a figure on 69 as to what would have been the profit under the contract.

I have already explained to the jury what in my opinion [2193] the profit under the contract would have been. It would not have been $25,000; it would have been in excess of $200,000.

The Court: That is, you mean if all Winckler & Smith had done would be to process 12,000 tons—forget everything else?

The Witness: Yes, forget everything else, they would have made a profit of some $200,000.

The Court: So that I understand you—and please don't misunderstand, ladies and gentlemen of the jury, whether I agree with one witness or the other, but I am trying to understand it—your Exhibit 69, then, is the composite by trying to add a supposed production of 12,000 to what already went on?

(Testimony of Robert Hodge.)

The Witness: That is right, sir.

The Court: Am I right in this—let me ask your opinion. On AZ counsel has stated that he contends that $25,000 shown at the bottom was the net result of the profit, apparently on this composite basis, that adding 12,000 tons to what was already done that there would have been a net profit of 25,000, which would, therefore, have to be deducted from the $184,000 loss, and there would still be a large loss, that is what he apparently contends as I understand him. If that is true, in your opinion is or is he not using the $87,000 figure twice?

The Witness: He is using the $87,000 figure twice; he is [2194] also using the $37,000 figure twice; he is also using the 56,000 some odd dollars absorbed in the processing cost twice; he is using a total of 181,000 odd dollars twice.

Q. (By Mr. Strachan): Let me see if I understand your position, Mr. Hodge. You say that the $87,000 of sales expense, the $37,000 of general administrative expense, are items that are included in the loss for the year of $184,000?

A. That is true, sir.

Q. What?

A. That is true, they are in there, the statement clearly shows it.

Q. Is the additional brokerage of $22,500 in there? A. No, sir, that is not in there.

Q. If the $87,000 and the $37,000 are in the $184,000 net loss, you on Exhibit 69 have made a double deduction, have you not—— A. No, sir

(Testimony of Robert Hodge.)

Q. ——in that you added together the $22,500 brokerage that is not in the loss, together with the $87,000, which you say is in the loss, and the $37,000 which you say is in the loss, and you deducted that total amount of $147,000 from your gross profit figure; isn't that correct?

A. No, sir, you are very, very wrong.

The Court: Counsel, this is so clear to me that unless we want to excuse the jury and talk about it, I am not going [2195] to permit you to go further.

On Exhibit 69, Mr. Witness, in order to arrive at a composite figure, you went back to 65, the statement ending January 31, '52, and before you started out—if you will look at 65, ladies and gentlemen of the jury—there was a $10,000 loss, the cost of sales exceeded the sales by $10,000. Now, there were two big items that went to make up the loss that eventually wound up of $184,000. One is $87,000 shown as selling expense. one is $93,000 shown as administrative expense. Let's forget the miscellaneous income. So you get $184,000 loss. Now, in making the composite the witness has made a premise—it may be sound or unsound, but he has said—Mr. Witness, is this correct, you said that you estimate that as far as the $87,000 item it would have been the same whether they processed 8,000 tons or whether they processed eight plus twelve thousand tons?

The Witness: Plus 22,000 brokerage.

The Court: Pardon me. We will take the brokerage next. But the general selling expense, which included outside warehouse, freight out, travel, ad-

(Testimony of Robert Hodge.)

vertising, sales and traffic salaries, telephone, telegraph, miscellaneous, you premise that would be the same?

The Witness: That would be the same.

The Court: There is figured in that $87,000 a $7,000 item on brokers' commissions? [2196]

The Witness: That is true, sir.

The Court: But since there was more brokers' commissions to be paid, you then figured another 3 per cent to make the $22,000 figure?

The Witness: That is right, sir.

The Court: So in making your composite figure you take the $87,000 in toto off of 65, is that right?

The Witness: That is right, sir.

The Court: So, therefore, by making your subtraction here you have taken it out of the loss which shows on 65?

The Witness: Right, sir.

The Court: Then you have added $22,000 for brokerage, which is in addition to the $87,000; is that right?

The Witness: That is right.

The Court: Now, you come down to the $93,000 item, which shows on 65, and you say that $56,000 of that was general and administrative, which was included in the price paid for processing?

The Witness: That is right, sir.

The Court: So you say there is an excess shown here of $37,000, so you dispose of the figure on 65, the $93,000 figure, by saying $56,000 of it was included in the cost of processing, which they got back——

(Testimony of Robert Hodge.)

The Witness: That is right, sir.

The Court: So you don't count it, you say the excess [2197] $37,000 we will count?

The Witness: Yes.

The Court: So you count the $37,000. Therefore you have, in substance, crossed off 65 the $87,000 and the $93,000 figure, and instead you have substituted three new figures—eighty-seven, twenty-two, and thirty-seven thousand, which total $147,000 as the cost?

The Witness: That is true, sir.

The Court: Therefore, you have taken all the cost items off of 65 and you say we wind up with $25,000 profit, and we have eliminated the loss we have shown?

The Witness: That is right, sir. [2198]

* * *

The Court: Now, ladies and gentlemen of the jury, nothing that I have said here indicates what I believe as to this man's credibility, his competency, the accuracy of his figures, whether I agree with the premises that he has taken or admitted, anything like that; I am merely trying to understand what he did. And if I am in disagreement with counsel, that is another matter.

Any accounting problem is a complicated problem, and to the extent that I can help you understand it, and that you not be confused about it, that is what I want to do. I am not trying to argue plaintiff's case; I am not trying to argue defendants' case. I think

that we are all entitled to understand what the witness claims by a computation. [2199]

* * *

The Court: The record will show the jury absent. I want you to cross-examine if you want to, but it is so patent to me, the basis on which this is figured, that I don't want any attempt to confuse the jury in what the witness did.

The witness may have done it wrong, but it is patent to me that he has disposed of, from 65, on his theory, these two items; that, therefore, he has no loss left, and when he comes down to the end of 69 his so-called profit is the composite profit.

Mr. Strachan: That just isn't the way it was done, [2200] according to my view.

The Court: Look here. It took me a little time to get it in my head, but it is here. On his 69 he started out with what he would have made, and then he has taken $87,000 and deducted it from one seventy-two —is that right?

Mr. Strachan: That is correct, and that is what I did here.

The Court: That crosses eighty-seven off over here on 65. Just follow me a minute.

Mr. Strachan: I have taken it off here (indicating).

The Court: He has taken—if you have taken it off here, then you also have a composite figure, which will mean—you are proving the same thing he proved, it is just a matter of argument what you contend—let's take his for a minute. He also has taken $37,000 of the $93,000, he has taken that off,

so you dispose of 37,000 here. He contends that the other 56,000 is included in the processing, so he has taken the other 56. In substance, he has taken the 93,000 off here. He therefore has disposed here—forgetting about the ten up here and the six down here, ten loss to start with, and the six other income—he has disposed of the $184,000 loss, therefore on his calculation the $25,000 shown down here becomes the composite result. He has also added an item of expense of $22,500. Now, your result—our dispute arises here, is your result a composite result [2201] or is it a result on 12,000 tons of oranges? If it is a composite result, then there is no dispute in the two exhibits.

Mr. Strachan: I say it is exactly what Exhibit 69 says, the Winckler & Smith estimated profit from processing 12,000 tons of Valencia oranges, period.

The Court: That is conceded to be an error, that statement.

Mr. Strachan: I don't think it is an error.

The Court: Let me show you what you have done here. Your result is the same as plaintiff's result, but your result instead of being what you say it is, what they would have made on 12,000 tons, it is a composite result. Here is why. Follow me a moment. You first take off the $87,000 here—is that right?

Mr. Strachan: That is a selling expense, and that is what it is designated.

The Court: You then have taken the $87,000 out of the statement right here, you have reduced this loss by $87,000. You have taken the $37,000 out of the $93,000. You have cut this down to fifty-six——

Mr. Strachan: You haven't eliminated that. That is still expense that he had to be borne.

The Court: You have taken it out here (indicating).

Mr. Strachan: He has taken it out, too.

The Court: You can't take it out twice. [2202]

Mr. Strachan: What you do is pick up this figure from this and make the deduction there.

The Court: Do you concede that the $56,000 that he talks about under his theory could be included in the processing that was paid?

Mr. Strachan: No.

The Court: He says he takes $56,000 out there because it has been paid for. Our whole dispute is what you contend on AZ is this figure of $25,000. If you contend that that figure on AZ is the profit made on 12,000 tons without reference to anything else——

Mr. Strachan: That is what I contend it is.

The Court: You are in error. If you contend that that is the composite result, then there is no dispute between you.

Mr. Williams: May I interrupt a minute to talk to counsel?

Mr. Strachan: My accountant points this out, and I am referring now to the income account as of the end of the year, if you eliminate these two here, the 87,000, part of the 93,000, then you no longer have the loss of 184,000, but you have only this loss of 10,000.

The Court: Right. That is what I have been talking about. And if you eliminate these in making a composite return, you can't include them twice,

you can include them once, but you can't include them twice. [2203]

Mr. Strachan: Then in here, instead of $184,000 you should have a $10,000 figure, because he has added it back in here.

The Court: I think Exhibit 69 is poorly set up, with all respect to you, Mr. CPA.

Mr. Dixon: I agree.

The Court: And it is very confusing. But I think if you will confer with your accountant you will see that——

Mr. Strachan: If you are going to make a composite of that, then you disregard this. Say you have taken those out up here in this computation, then what you have is a $10,000 operating loss only, instead of the $184,000. So you would set the $25,000 of profit on the 12,000 tons off against a $10,000 loss, and would have come up with a $15,000 profit. [2204]

The Court: Well, now we are getting close together, but don't forget that in getting the $184,000 loss, you started off with a loss of seven, and there was other income, so it was on that basis that there is a $3,000 loss here. I don't know, following it through, but that it might be that you would set the $25,000 off against the 3,000 and wind up with twenty-two. I am not concerned about that.

Mr. Strachan: I think that might be it.

The Court: Well, let's confer about it between yourselves, and then get back and finish up this cross and see if we can get rid of this man.

The Witness: Thank you, your Honor.

(Recess.)